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THE LAW MAGAZINE AND REVIEW.

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I.—ON THE AMENDMENT OF THE LAW.*

BY FARRER HERSCHELL, Q.C., M.P.

IT has often been the practice for those occupying similar positions to that which I have the honour to occupy to-day, to review the progress which has been made during the preceding year in the branch of science with which they have to deal. Were I to adopt this course, my task would indeed be soon accomplished. For my address would be as brief as the celebrated chapter on snakes in the history of Iceland. "There are no snakes in Iceland." I too must have said "There has been no law reform, no progress in jurisprudence in this country during the past year." I read, the other day, in a novel which has beguiled the leisure hours of many of us, lately, that the first step towards a true acquaintance with persons or things, is to obtain a definite outline of our ignorance. I think it is equally true that the first step towards any true progress is to obtain a definite outline of our deficiencies. It would be quite hopeless to think of doing this exhaustively in the time allotted to me. You can hardly turn in any direction without seeing some defect calling for a remedy. And were I to attempt it, I should exhaust your patience long before I had exhausted my subject.

* An Address delivered by Mr. Herschell, as President of the Jurisprudence Department, Social Science Congress, Liverpool, Oct. 1876; revised and corrected by the Author.

The only alternative is to select two or three particular subjects, either because they are of pressing importance, or because they have been recently forced upon public attention. For I am only too conscious how almost impossible it is, without the help of this public pressure, to obtain any law reform at all.

At the outset I cannot but allude to a subject which in my opinion stands at the very threshold of all true law reform, though I fear it excites but little public interest. I mean the securing either the Digest or Codification of the law. It is still what our poet has called—

“ The lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances.”

Committees have reported, commissions have made suggestions, experiments have been attempted, and yet we seem as far to-day from the goal as ever we did. I cannot help thinking that this arises in part from the extravagant views, put forward by many of those who have advocated this reform of the law, of the practical effect which it was likely to produce. An extravagance which has rendered it easy for those who were hostile to the reform to show that the expectations raised could never be realized, and which has enabled them, without difficulty, to depreciate the effects of the change altogether. Some have written and spoken as though you could put the whole law of England into a small volume, to which any person, wishing to know what was the law in any particular case, would be able to turn, in order to find the question answered and all his difficulties solved : as though you would thus have reached the happy time when every man could be his own lawyer, and when far more than half the work of lawyers would be at an end, for the law in all cases being beyond a doubt, there could only remain disputes as to the facts. This is, of course, an absurd extravagance. No Code, however extensive, could possibly afford a solution for every legal question. Even in those

regions of law which seem best explored and most thoroughly settled, new questions are constantly arising. There is hardly a practical lawyer, but is often puzzled to decide what is the law applicable to a set of circumstances of such constant occurrence, that he can scarcely believe that no distinct determination of it is to be found. This, it will be seen in a moment, is scarcely to be wondered at. Lay down your principle with the utmost precision, and define the limits of its application with what accuracy you may, there will always remain a border-land surrounding it, and separating it from conflicting or complementary principles, where numberless cases will be found which it is difficult to group precisely within one principle or the other. So long as the possible combinations of the circumstances or transactions of human life remain infinite, so long will the idea that by a codification of the law you could make every man his own lawyer, and a certain opinion possible in every case, remain the vainest of delusions. The uncertainties of the law, with which law-makers as well as lawyers are so often reproached, are, I fear, to a considerable extent inevitable.

Do not let it be supposed, that because these extravagant notions of the results of codification are unfounded, that to accomplish it would be productive of aught but the highest advantage. There are numberless questions which mercantile men, for example, in possession of a Code, could themselves answer without difficulty, for the solution of which they are now driven to their lawyers, at the expense of precious time and opportunities, or they still oftener have to be content to take the chance of the mischiefs which may result from their ignorance.

Beyond this, I say deliberately, that in my judgment it is a disgrace to a civilized country, that in no branch of its jurisprudence is there to be found a definite and authoritative exposition of the law. I have, I own, more than once felt ashamed when asked by a foreigner where he could find the English law on such subjects as Bills of Exchange or Marine

Insurance, to be able only to direct his attention to text-books on those subjects, and to be obliged to warn him that what he would find there was for the most part the opinions of men more or less learned, and more or less accurate, but must by no means be taken as a certain statement of the law.

In the next place, the existence of a Code or Digest would immensely facilitate the labours of lawyers in advising on, and of the Courts in determining, the law. At present, to answer really simple questions, a reference is often necessary to numerous cases buried in many different reports, and which can only be unearthed by the aid of text-books of portentous dimensions, and by no means astonishing accuracy. And when you have collated the various reported cases, and arrived, as you think, at the principle they embody (and it is a piece of rare good fortune when you can evolve such a principle at all), you find, perhaps, that some enactment has been passed so affecting the law as to render your researches almost, if not altogether, useless. Need I point out what a waste of time is involved in all this, to say nothing of the diminished value of an opinion or decision which, arrived at by such a process, must necessarily be liable to error and uncertainty? And can it be doubted that, if lawyers could advise, and judges decide, with materially increased ease and certainty, there must accrue immense benefit to the public?

Above all, without something like a Code or Digest, it seems to me hopeless to look forward to any systematic reform of the law. Without it you will have to be content with desultory amendments, removing here and there some glaring evil, but leaving the law in more hopelessly tangled confusion than before.

I have endeavoured as briefly as I could to point out some of the evils which the present system entails, and some of the advantages which would flow from the proposed change, though much more might be added under each of these

heads. It must not be supposed that I am insensible to the dangers involved in the proposed change, but I believe the disadvantages would be far more than outweighed by the benefits which would be gained. I therefore venture to urge on you a remedy which has more than once before been in substance suggested. It seems to me that the object, if it be, as I believe, desirable, is far from unattainable. The work, if it is to be properly done, must of course be committed to the hands of men of the highest legal ability; men in no way inferior to the best of those who adorn the Judicial Bench. To obtain such men you ought to give them the same remuneration, and confer on them the same rank, as you do on the judges. And, inasmuch as you could not hope within the limits of less than what I may term the judicial life, to see the task accomplished, there would, I think, be no difficulty in inducing men thoroughly qualified to enter upon a career so eminently useful. They should be left to deal in such order as they thought best with the various branches of law. And thus each year, one or more codification bills, the result of their labours, might be introduced in Parliament. Of course it would be essential to the scheme that Parliament should accept these bills as a correct statement of the law, making no attempt while passing them to alter or amend it, but leaving this, if necessary, to a future occasion. I do not think there would be any great difficulty in persuading Parliament to take this course, as all must be agreed that if the law in any respect be bad, the first step towards making it better must be to know precisely how bad it is.

I shall, of course, be met in many quarters with a cry of horror at the expense this would occasion. But the expense would really not in itself be very considerable, and in comparison with the saving it would ultimately effect, and the benefit that would flow from it, would be absolutely inconsiderable. It would be quite sufficient to appoint three such Commissioners as I have suggested, and the whole expens

of the work would be covered by less than £20,000 a year. You think nothing of such a sum when with missiles from monster guns you demolish iron-clad targets, and yet surely it is as high a duty in a civilized community to do its utmost to provide within its borders an efficient, cheap, and satisfactory administration of justice, as it is to protect itself from outward aggression. I am as ardent an advocate of economy as any man, but I believe it to be the falsest economy—indeed, to be the most vicious extravagance—to shrink from a small addition to present expenditure, when you are well assured that it will ere long repay itself tenfold.

I turn now to a very different subject, and one which recent circumstances have forced upon public attention. It is nearly three centuries ago since Shakespeare taught us to look for absurdities in "Crownor's Quest Law." And many have been the stories, during the intervening years, of extraordinary and ludicrous verdicts, rivalling in their absurdity the law laid down by the Coroner. In spite of all this, the Coroner is appointed, his Court is constituted, and proceedings before him are conducted, almost exactly in the same fashion as they were in the days of Queen Elizabeth. Not because the evils have been unnoticed or unfelt, but by reason of that constitutional apathy which seems with us to render reform impossible, until the evil is felt to be absolutely intolerable. At length, I believe, we have reached that point with this branch of our law. The proceedings at a recent inquest, which are doubtless so familiar to all present, that I need not particularly refer to them,—though I cannot but say that in the opinion of many, and certainly in my own opinion, they will disgrace the annals of our jurisprudence,—have forced on the public mind the conviction that the mode of appointing Coroners, the constitution of their Court, and the mode of conducting proceedings before them, urgently require revision and reform. It may not be out of place, on such an occasion as the present, to consider what direction this reform ought to take. At the very out-

set, I think it will almost be conceded that the mode in which Coroners are appointed is radically bad. The office is essentially a judicial one. The Coroner has often to lay down the law on questions of considerable delicacy and difficulty—he has to determine what evidence shall be admitted, what rejected—and he has to, or at least ought to, keep within its due bounds the inquiry before him. Of all modes of obtaining the best man for such an office, election by the freeholders of the county is surely about the worst. No one would dream of extending it to other judicial offices. Nor do I think that in the case of boroughs things are much better, for the election by the town council can hardly be considered a guarantee of a satisfactory appointment. Let me not be misunderstood. I am far from denying that able and competent men have at times obtained the office under the present system, but there have been many appointed who were very much the reverse, and what we have to deal with is the question what the system is likely to lead to.

I feel most strongly that the present mode of appointment ought at once to cease, and that the Coroner should no longer be elected, but should be chosen for his office by the Home Secretary; and he should be a man similar to the best of the stipendiary magistrates in ability, training, and judicial qualities. I am not going to re-argue the old controversy whether the lawyer or the doctor be the better fitted for the office. It will be seen presently, that I entertain no mean opinion of the functions of medical men in connection with Coroners' inquests, but what I insist upon is that certain legal and judicial qualities are essential to the efficient discharge of a Coroner's duties. If you can find these pre-eminently in a medical man, by all means appoint him, but I own I should no more expect to find them there, than I should expect to find amongst my brethren of the bar one skilled in the diagnosis of disease.

Suppose, then, that you have secured the appointment of

such a judicial officer as I have indicated, you ought, of course, to afford him the best possible means of arriving accurately at the cause of death. This leads me to the next reform which I have to propose. What happens now in the case of a sudden or violent death? Almost invariably the medical practitioner who happens to be nearest is sent for. He examines the body, gives evidence of its condition, the position and character of the wounds, if there be any, and to him is very frequently entrusted the duty of making the post-mortem examination. How long is it since death took place: whether the wounds could or not be self-inflicted: what was the probable weapon or other cause of death? for all these and many other most material facts you have to place reliance almost exclusively upon the evidence of this expert. What guarantee have you that he will be the person best fitted to lead you to a right conclusion in these matters? It is as likely as not that such investigations have never occupied his attention since he was a student, and that even then he was but ill-qualified to conduct them. Even supposing there was a time when he was capable of forming an opinion on such matters, it is only too likely that during years exclusively occupied with the treatment of ordinary human diseases, his knowledge and skill in this special department have become rusty and unavailable. I believe I shall have the concurrence of the highest medical authority when I say, that the investigations to which I have referred require special training, skill, and experience, and that it would be quite false to suppose that you are likely to find them in every practitioner to whom chance may direct your steps. And yet how much may depend on your finding them! The guilty may go unpunished, the innocent be in peril, and clouds of suspicion may embitter a whole lifetime—all for want of this requisite skill and experience. Be it observed, too, that blunders thus made are for the most part irreparable. As a rule, no subsequent examination can afford the information which at first was patent to skilful

eyes and a trained intellect. Even if the Coroner possessed the highest medical skill and scientific attainments, he could not supplement the lack of observation, or check the blunders arising from an inaccurate or ignorant exposition of the supposed facts. The magnitude of the evil, to which I have been calling attention, was deeply impressed on my own mind some years ago by an incident which came under my notice. A highly respectable medical man was called as a witness to prove that he had examined some stains found on the clothes of a prisoner, and on a weapon in his possession. After describing the mode in which he conducted his investigation, he declared without hesitation that the marks were produced by human blood. Being somewhat startled at so positive a statement on a point which I had understood could not be ascertained with such absolute certainty, I narrated the circumstances, shortly afterwards, to a medical man of the highest scientific attainments. He could hardly believe that such evidence had been given, and assured me that even if the investigation had been properly conducted so positive an opinion could not have been justified, but that carried out in the way described no opinion worthy of the name could be formed, inasmuch as the process adopted was so blundering and vicious as to render any real result impossible. "We often," he said, "as a test question in examinations, require a description of the mode of examining supposed blood stains, and if an answer were to describe such a process as was detailed in the witness-box, the candidate would most probably have failed to obtain his diploma." The evidence to which I have alluded was given on a trial for murder. A man and woman stood in the dock in peril of their lives. Fortunately there was ample evidence apart from the doctor's to bring guilt home to them. But the incident is surely one which may well make us tremble. The remedy is happily not far to seek. It would be arrived at, I think, by appointing in every county and borough one or more persons selected on account of their special fitness

to discharge such duties—and every year would add to their capacity and experience. Whenever a death occurred from manifest or supposed violence, or an investigation into the cause of death was necessary, one of the persons so appointed should be summoned without delay, and all the information which an examination made at the earliest opportunity by a person of the requisite capacity could afford, should thus always be in possession of the Coroner.

I dare not, lest time should fail me, go into further detail, but I think all these appointments might be made without any great increase of expense, especially if these duties were combined with others requiring similar qualifications which are now discharged by public officials.

Another great advantage, too, would be gained by the appointment of medical officers as part of the machinery for inquiring into the cause of death. It has not been amongst the least of the scandals which lately have brought discredit upon the office of Coroner, that inquests have been held, causing serious pain and annoyance to the relations of the deceased, where no circumstances existed which justified such a proceeding. And there can be no doubt, I think, that a great number of inquests take place every year throughout the country which are wholly needless, but which involve none the less no small expense. I think all this would be to a great extent obviated if the medical officer attached to the Coroner's Court were required in every case, which suggested the necessity of an inquest, to make at once a report of the circumstances to the Coroner. For such a report, the result of an immediate inquiry by a competent medical man, would in many cases show that there was no sort of reason to doubt that the death arose from natural causes, and that an inquest was quite unnecessary. Of course it would remain, as now, in the discretion of the Coroner, whether he would proceed to hold an inquisition, but he would be in an infinitely better position to judge of its necessity.

I believe the two reforms I have submitted would do much to restore the office of Coroner to its proper place in public esteem. But there is one other change I have to suggest, more startling, and, I frankly admit, more questionable than these ; and that is, the abolition altogether of the Coroner's Jury. Let me point out some of the mischiefs and anomalies which have led me to this conclusion. The Coroner's Court, at present, fulfils a double function. It not only inquires into the cause of death, but in many cases it initiates criminal proceedings. I may remind the unprofessional portion of my audience that a verdict of murder or manslaughter by a Coroner's Jury justifies, and indeed requires, the arrest of the person accused, and his detention either in actual custody or on bail until his trial, which, in course of law, would take place at the next assizes, without any further preliminary proceedings ; the verdict of the Coroner's Jury having the same effect as a commitment by a Magistrate and the finding of a true bill by a Grand Jury. But, notwithstanding that proceedings are pending in the Coroner's Court, or even that an incriminating verdict has been found there, the accused person is none the less taken before a magistrate, that the facts may be inquired into and the case dealt with in the ordinary way. There, an entirely independent investigation takes place, resulting either in the commitment for trial or discharge of the accused person. If he be discharged as being entirely free from blame, which not unfrequently happens where a Coroner's Jury have found a verdict of manslaughter, he must all the same remain a prisoner until the next assizes, or under bail to appear then and take his trial, although it is practically speaking, a certainty that, under such circumstances, he never will be tried. If the magistrate commits, and the Grand Jury finds a true bill, it is on this indictment he is tried, and if acquitted, no evidence is offered on the Coroner's inquisition. If, too, though the Magistrate commit, the Grand Jury should find no bill, it has become the regular routine for the

prosecution to offer no evidence on the Coroner's inquisition, and, in effect, to accept the counter determination of the Grand Jury as overruling it. It will thus be seen that though, in theory, and, no doubt, in ancient times in practice, the trial of the accused resulted, as a matter of course, from the verdict of a Coroner's Jury, this is no longer the case. It follows now only upon quite independent proceedings, pursuing entirely the same course as criminal proceedings do in cases not coming within the cognizance of the Coroner's Court. Surely you have here both anomaly and practical mischief. You have two separate tribunals for the purpose of determining whether a man is to be put on his trial, fulfilling their functions at the same time, but quite independently of one another, and arriving, it may be, at conflicting conclusions. And more than this, you practically disregard altogether the finding of one of them; and though a Coroner's Jury have found a verdict of wilful murder, you do not, in practice, by reason merely of that finding, put the prisoner *in reality* on his trial, though you still go through the farce of pretending to do so. Few surely can doubt that either the finding of the Coroner's Jury should cease to be sufficient warrant for putting a man on his trial, or that, if it remains so, the second investigation before the Magistrate and the inquest by the Grand Jury should no longer take place in cases where the Coroner's inquisition has resulted in a verdict of "guilty." And if this double proceeding is no longer to be permitted, fewer still, I should think, can doubt that the ordinary tribunal which has been constituted for the purpose of determining whether there is sufficient *primâ facie* evidence of guilt is the better fitted of the two to discharge this duty. To say nothing of the skill and experience of the Magistrates, it must be remembered that, before the Coroner's Court, the accused person is frequently unable to be present, being already in custody under a Magistrate's warrant, and he is thus unable to suggest to his advocate, if he have one, or himself to put to the

witnesses, the questions which may be absolutely essential for fairly weighing his acts and judging of the guilt or innocence of his conduct.

When we look to the origin of the Coroner's Jury, we certainly do not find any reason for its retention. It was originally summoned, and, indeed, in strictness I believe still should be, from the immediate neighbourhood of the place where the death occurred. And this was done for the purpose of obtaining from the Jury, as neighbours who were likely to be acquainted with them, the facts relating to the death. Indeed, it is still laid down in Sir John Jervis's work on Coroners, that, "after each witness has been examined, the Coroner inquires of the Jury whether they wish any other questions to be put." "This," he says, "is essential to the due administration of justice, because the Jury, living in the neighbourhood, are most probably acquainted partially with the circumstances of each case, whereas the Coroner must in most cases know nothing except from the evidence." However this may have been in olden times, in the present day the chances are enormous, certainly in towns, probably even in country districts, that the Jury will know nothing of the matter at all. But, even if they did, I should think we have all come to the conclusion, now-a-days, that such partial acquaintance with the circumstances as may be picked up from the tittle-tattle of the neighbourhood is more likely to mislead than to assist in the investigation of facts, and is about the worst possible preparation to fit a Juryman for the proper exercise of his functions in the jury-box.

I own, then, I am led to the conclusion that the time has come when we may well dispense with the services of a Coroner's Jury altogether. If the death be a natural one, or be innocently caused, this could as well be determined by a stipendiary Magistrate as by a Jury; and it is to such a person, as I have said, that you ought to entrust the office of Coroner. And if on investigation it turned out that there

was ground for criminal proceedings, he should conduct the investigation in the ordinary way, and at its close once for all commit the accused person for trial. You would thus get rid of all the evils of a double investigation, and there would be this incidental advantage, that throughout the counties you would have a Coroner, with the qualifications and powers of a stipendiary Magistrate, conducting the preliminary investigation in all cases where death has resulted from a crime.

It may be objected to this scheme, that the abolition of the Jury would render the investigation less public, and that the inquiry into the cause of death might thus either be burked altogether, or be less thorough than it would otherwise have been. Certainly, if well founded, this objection would be a formidable one. And, I fully admit that there was a time when the Coroner's Jury afforded to the public a much-needed protection. But, in the present day, I cannot think the objection has any substantial foundation. The press is now our real protection against such an abuse. So long as our Courts are open, reporters as assiduous and eager, and newspaper editors as ready to open their columns to complaints as they are at present, I do not think there is anything to fear on this score. Indeed, I may well appeal to the fact that the experience of the Magistrates' Courts goes far to disprove the validity of such an objection.

Since I prepared this portion of my address, I have read in the *Times* two interesting articles on Coroners and Coroners' Juries, in which I am glad to find that the writer has, in several respects, and especially as regards the abolition of the Coroner's Jury, arrived at the same conclusions as myself.

I have been able only to sketch in outline the changes I desire to see, but I dare not linger longer on this part of my subject.

I pass now, by no abrupt transition, to another subject which appears to me of the highest importance. We have

been considering the means to be taken for the discovery of a certain class of crimes, and the steps which are designed to ensure the punishment of the guilty. This naturally leads us to consider whose business it is to see that the necessary steps are taken, and what guarantee we have that the law will be vindicated. We are obliged to confess that we have no such guarantee, and that there is no one on whom, by our law, this duty devolves. We have made laws, the only value and efficacy of which depends on the knowledge that they will assuredly be enforced, and we have cast on no one the duty of enforcing them; we have done nothing to ensure their being put into operation. This is surely a result which ought to startle us. And so indeed it would, were it not that fortunately (as often happens with us) a practice has grown up which, clumsy and insufficient as it is, mitigates, though it far from removes, the evil and reproach. Let a crime be committed which leads to the intervention of the police, and they become at once in some sense the prosecutors. They arrest the offender, they bring him before the magistrate, they collect the evidence; and in many places, in form as well as substance, they actually conduct the prosecution. They do this, too, in the public interest, not unfrequently without the desire, and sometimes even against the will, of the person immediately wronged. But let the offender be, not a wretched pickpocket, who filches a few shillings or pounds, but a commercial man, who by an act of dishonesty or fraud as direct or daring, has misappropriated as many thousands, then, unless the vengeance and indignation of the party wronged induces him to pursue to punishment, the offender is likely to go scot free, and the violated law to remain unvindicated. It has long been felt that this state of things is by no means creditable to us as a nation, and more than once measures have been introduced in Parliament with a view to remedy it. They have, however, always met with an opposition which has very speedily extinguished the effort. As lately as the

session of 1875, the Queen's Speech promised us a bill for the appointment of Public Prosecutors, but unhappily the promise never was fulfilled.

In dealing with this subject, it seems to me vital to keep well in view the distinction between the mere conduct of a prosecution, and the obligation to see that it is instituted and pursued to its legitimate conclusion. With the mode in which prosecutions are conducted, when carried through in ordinary course, I do not think there is any very grave ground to find fault. Theoretically, it is no doubt anomalous that such a duty should be left in private hands, and carried out by those who are not appointed or specially qualified for the purpose. But I feel bound to bear my testimony to the fact that in practice the work is, on the whole, well done, and that there are not many prosecutions which fail owing to the inefficient manner in which they are conducted. I should therefore be disposed to leave the existing system, in this respect, untouched for the present, as by so doing a great deal of the opposition which has barred the progress of this reform would be prevented. When Public Prosecutors are spoken of, it at once suggests to many the entire abolition of the present system, and the creation throughout the country of an army of public officials by whom all prosecutions should be conducted. Whereas, in truth, what is in my view by far the most important duty which would be fulfilled by Public Prosecutors, may be carried out without anything of the kind. What you want is, some official whose business it shall be to see that prosecutions are set on foot wherever there is ground for them, and that when once the criminal law has been put in motion, it should pass altogether out of the power of the party immediately aggrieved to permit it to be, or to render it, abortive. It is surely hardly necessary in this place to dwell upon the evils to which this points. I will venture to say, that there is not a lawyer or commercial man in this Hall but can recall more than one case where there has been a gross

violation of the criminal law, and yet no steps have been taken to punish the offender. Pity for him or his family, or still oftener the disinclination to throw good money after bad,—and add the annoyance and trouble of prosecuting to the vexation of the loss,—has stayed the hand of the victim. The first irritation at the loss suffered is indeed the only force which leads to a prosecution at all. And even if, when freshly smarting from the fraud, a prosecution be started, how often is it carried through to its conclusion? Again and again it has gone no further than the issuing of a summons, or perhaps, at the most, a hearing or two at the police court. The friends of the accused then intervene, they approach the prosecutor and soothe his irritation by a most potent application—the making good a portion of his loss, and thereupon the prosecution ceases and no more is heard of the matter. So that the police court is being made more and more a debt-collecting instrument, by which payment is extorted from the relations and friends of a fraudulent debtor, until the public interest in the punishment of wrong-doing and the vindication of the law drops altogether out of sight. And even if the prosecution tides over this early stage, and the accused is committed for trial to the assizes, how often does it culminate in the statement of the counsel for the prosecution, that on consideration he has determined to offer no evidence, and the equally gratifying statement of the prisoner's counsel, that if the case had gone on, it would have been manifest how innocent his client had been of any criminal intention! The jury are then directed to return a verdict of "Not Guilty," the prisoner is discharged, and the whole matter wears a most cheering and satisfactory aspect. Yet to those behind the scenes, and accustomed to them, how solemn the farce! They know perfectly well what has happened. They know that most probably a crime has been in reality committed, but that the prosecution has been (if I may be pardoned a somewhat vulgar expression) "squared," and that the

prosecutor has left the court with pockets fuller than when he entered it. Again, I say, in this building I need not specify instances, they have been too recent and too notorious. All this is not to be wondered at. So long as you leave the matter in the hands of the party aggrieved it is only natural, and those who cry out loudest against such a proceeding would be very likely the first to pursue the same course. When, as often is the case, the party wronged is a bank, or other public company, managed by directors, is it surprising that they should hardly like to face their shareholders with the confession of a loss, the result perhaps of their own over-trustfulness, when they might avoid it; and still more should be unwilling not only to confess that they have been defrauded, but that they have rejected an offer to make good the loss? Even where the party who would naturally be the prosecutor is not himself the person directly injured, the evil is not unfelt. We have passed bankruptcy laws of singular mildness to the debtor, but which are fortified with ample provisions designed to lead to his punishment if he be dishonest. Yet frauds against the bankrupt laws are, we all know, as common as their punishment is rare. The trustee is subject to the same influences, and led to abstain from prosecuting by the same inducements, as the ordinary creditor. Though all this is natural, it is surely in the highest degree mischievous. Every such case tends to render the criminal law a dead letter, to destroy its power as a deterrent, and to encourage fraud by the belief that it may be perpetrated with impunity. It blinds men's eyes to the fact that the community have been wronged as well as the individual, and that they have perhaps a greater interest, and certainly as great a right as he has, to have the law vindicated. It acts prejudicially, too, in another way. You cannot keep too sharply defined in the minds of men the distinction between a mere civil wrong affecting the individual only, and a criminal act. And when once you permit the criminal law to be used for the purpose of repairing the

loss to the individual occasioned by a crime, you take a good step towards obliterating this distinction. And, as it seems to me, you diminish the sanction of the law and induce a low state of morality, especially, perhaps, in commercial matters. For there can be nothing more disastrous than that a crime should come to be thought a light thing, instead of, as it ought to be, odious. These thoughts must surely have been forced on many of us during the last few years, and nowhere more so than in this town. It can hardly I think be a mere fancy when it appears to me that I have seen a change for the worse in this respect since I first came to these assizes, fifteen years ago. Commercial crimes which were rare then have become more frequent, and not only so, but acts which astound the community, and were a source of long-continued wonder in those days, are now so common as to be scarcely a nine-days', even hardly a nine hours', wonder now. I may be wrong, but I cannot help attributing this result, in part at least, to the cause to which I have been alluding. And if there be any foundation for such a supposition, it surely becomes the interest of us all to see that these causes should cease to operate. How can this be effected? The problem does not seem difficult of solution. Let a public officer of high standing be appointed to take the general control and supervision of all prosecutions, and under him let a sufficient number of subordinate prosecutors be appointed (and they would not need to be numerous), whose duty it should be to see that prosecutions were instituted whenever crimes were known to have been committed. The prosecution of what I may term the ordinary police crimes would still be instituted as at present; but it should be the duty of the public prosecutor to see that these, as well as those instituted by himself, were properly conducted and carried out to their legitimate conclusion. It should no longer be in the power of any private person to stay the operation of the law. A supervision and control such as I have suggested would do much

to ensure the efficient conduct of prosecutions by those in whose hands they now are, and in cases of difficulty or of an unusual character, their action might either be supplemented by that of the Public Prosecutor, or he might take the conduct of the prosecution out of their hands altogether. I can do no more on this occasion than hint at the remedy roughly, but the details would, I think, be found to involve no insuperable difficulty, and if the end to be gained approximate in importance to my estimate, the trouble which might be involved in working them out would be amply repaid.

I have dwelt at such length upon reforms of the municipal law that but little time remains to say anything on the other great subject which falls within the province of this department—International Law. If, then, my remarks upon it be but few, this must not be taken as a measure of my sense of its importance.

During the past year two questions falling within this branch of the law have attracted public attention. The one regarding our duty in respect of Fugitive Slaves taking refuge on British vessels; the other having reference to the obligations and rights which exist in respect of Fugitive Criminals. On the first of these we have obtained the report of a Commission, containing elaborate expositions of the law by eminent lawyers. But whatever it may have achieved in guiding our future conduct as to the treatment of fugitive slaves, it cannot, unhappily, be said to have done much to settle any questions of international law, or to dissipate the doubts surrounding them. The basis of law from which the practical conclusions are to be derived is by no means agreed upon; views diametrically opposite being taken by eminent lawyers on the fundamental question how far a public ship in foreign waters is exempt from the local jurisdiction. I cannot help saying, that seeing how extremely divergent are the views taken, not only by lawyers in this country, but by foreign international jurists also, on the point, and how

grave the inconveniences are to which this difference of view is likely some day or other, and perhaps before long, to give rise, it would be extremely desirable that an effort should be made to obtain some common agreement on the point—an agreement which might be most difficult when a particular case has arisen, but which I should think would be far from impossible now.

Questions respecting the Extradition of fugitive criminals have been brought into prominence by the controversy which has recently arisen between this country and the United States of America. As I see that one of the special subjects for discussion by this Congress is to be, "What are the limitations within which Extradition should be recognized as an international duty?" I do not propose now to anticipate that discussion. But I think it may be well to call attention shortly to the exact nature of the controversy which has arisen, and to one or two practical considerations which it suggests to us. I need hardly say that I do not intend to deal here as a politician with the conduct of the Government during this controversy.

It is probably known to most of you that whatever be the duties and rights of extradition arising from international law, the rights and obligations as between this country and the United States of America are now governed by what is called the Ashburton Treaty, which was entered into in 1842. By that treaty each of the contracting parties bound itself to deliver up to justice all persons who, being charged with certain specified crimes, should seek an asylum or be found within the territories of the other. Under this arrangement each country has surrendered to the other on demand many fugitive criminals. In the present year, however, the American Government having obtained the extradition of a man named Lawrence for a treaty offence, it was brought to the notice of the British Government that there was included in the indictment against him the charge of a crime for which his extradition had not been obtained. They there-

fore insisted that the American Government had no right to try a criminal, whose extradition had been obtained, for any offence except that in respect of which he had been delivered up. The Americans, on the other hand, insisted that if his extradition had been obtained in a legitimate manner, it was perfectly competent for them to put him on his trial for any other offence. There can be little doubt, I think, that the action of the British Government was to a considerable extent influenced by the existence of the Act of Parliament relating to Extradition which became law in 1870, and which no doubt embodies the only power which the British Government now possesses to give effect to the Ashburton Treaty. That Act provides that a fugitive criminal shall not be surrendered to a Foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to Her Majesty's dominions, be detained or tried in that Foreign State for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded. By that Act, too, all the statutes which enabled the English Government to give effect to the Ashburton Treaty are repealed. And inasmuch as it seems pretty clear that there is no law in America which prohibits the trial of the criminal for offences other than the extradition one, it would follow that, in the absence of an arrangement that he should not be so tried, if the repeal of the former statutes be absolute there is no longer any power in this country to surrender fugitive criminals to the American authorities. Section 27 of the Act of 1870, however, provides that that Act, *with the exception of anything contained in it inconsistent with the treaties referred to in the Acts so repealed*, shall apply in the case of Foreign States with whom those treaties are made, as if an Order in Council had been made, under the Act, applying it to them. And it is contended that the effect of this section (worded it must be confessed even more inaptly for its pur-

pose than most Acts of Parliament) is to leave the rights and duties under the Ashburton Treaty just as they were, merely substituting the machinery of the Act of 1870 in carrying out those duties for the machinery provided by the former Acts. On the whole, I own I think this view the sound one. Of course no British legislation could affect treaty rights. And it would be a monstrous conclusion that by destroying the power of the British authorities to act upon the treaty, Parliament had, by a side wind and without notice to America, in effect abrogated it. But seeing that so high an authority as Mr. Justice Blackburn doubts whether the statute admits of this construction, it seems clear that doubts should be set at rest by legislation. Setting aside, however, altogether the statute of 1870, it is contended by our Government that, on the true construction of the treaty itself, the person surrendered can only properly be tried for the offence for which his surrender was required, and that to act otherwise is a violation of the treaty. Had this view been insisted upon from the first, there is no doubt something to be said in its favour, though much, too, may be said the other way. But there can be no question that this view of the treaty has not been consistently taken by our authorities. One criminal at least has been tried here for other offences than those which occasioned his extradition, though it is true it was not a Government prosecution. And there can be no better indication of the view taken by our Foreign Office than the evidence given by Lord Hammond, who was for so many years Under Secretary of State, before the Committee of 1868, whose report led to the passing of the Act of 1870. He stated that in this country we admit that if a man is *bonâ fide* tried for the offence for which he is given up, there is nothing to prevent his being subsequently tried for another offence, whether antecedently committed or not. And he said, further, that in one case the very question, whether he could be so tried, having been referred to the law officers, it was held that it

would be difficult to dispute the right of the United States to try the person surrendered, for such other offence. Add to this, that two Secretaries of State have in public despatches taken practically the same view, and I think it will be seen that the American position, that we are not justified in saying that by virtue of the treaty we can insist that offenders shall be tried for the extradition offence only, is certainly a strong one. I purposely abstain on the present occasion from expressing any decided opinion of my own on the point. The result of this difference with the United States has been unfortunate. The extradition arrangements between the two countries are at an end. And the treaty is for the present a dead letter. This is a matter of concern to the community generally, and to no portion of it more than this town. With your daily ferry to the other side of the Atlantic, it is unfortunate that the dishonest members of your community can there find a secure asylum. And it is obviously important that with the least possible delay matters should be restored to a satisfactory position. We are led, then, to the question, is it desirable that we should insist that criminals should be tried only for the extradition offence? The reason which induces us to do so is no doubt creditable. We are justly jealous of our right and duty to afford an asylum to political offenders, and entertain a natural objection to the possibility of a fugitive surrendered by us being tried for any political offence previously committed. But, I think, we might, without any fear of endangering the rights of political asylum, sanction the trial of the surrendered person for offences other than that which led to his surrender. It will be remembered that the treaty specifies only the offences of murder, attempted murder, piracy, arson, robbery, forgery, and uttering forged documents. And I do not see why you should not permit the trial of the accused person, at all events, for any of the treaty crimes. Of course it may be said that these other

charges might be used as a pretence for punishing political offences. But in answer to this three things must be borne in mind. First, that by consenting to surrender at all, you do manifest a confidence in the due administration of justice in the courts of the country to which you deliver up the offender, and that it is only an extension of that confidence to trust to their dealing fairly with the trial of other offences. Second, the extradition could only take place upon proof of the commission of some grave non-political crime, so that the difficulty we are considering would only arise in the rare case where a person who had committed such a crime was also a political offender. And this is not the stuff out of which patriots and politicians are usually made. Third, the Americans themselves entertain similar feelings to our own with respect to the protection of political offenders, and are not likely I believe in practice to outrage this sentiment.

Whatever be the true construction of the existing treaty, I think it can hardly be disputed that, if it can be done without danger, it would be desirable to permit the trial for any of the extradition offences of a person surrendered for one of them, without the necessity of further proceedings.

As our extradition relations with America are about to undergo revision, and some modification of the treaty seems probable, it would be well to extend the list of crimes for which extradition may be required. I quite admit that extradition arrangements should be confined to grave crimes, but there are many offences of a very serious character which are excluded from the present treaty. Regret has more than once been expressed by the late Sir Thomas Henry—and I could cite no better authority on such a point—that there is no power to deliver up to America, for the purposes of justice, a person guilty of manslaughter, however aggravated its character. It has, unhappily, not been very rare for American vessels to arrive in our ports on board of which this offence as well as most serious cases of wounding have occurred; and I daresay the same thing has happened with

English vessels arriving at American ports. And yet no steps could be taken to punish the delinquents for want of any treaty arrangement between the two countries which touched these offences, and they have consequently enjoyed absolute immunity. So that it really comes practically to this, that against a large class of crimes committed on board English or American ships, when on the high seas, the law affords the unfortunate crew no protection whatever. Attention was called to this evil, as long ago as 1859, by your townsman, Mr. Henry Bright, and steps were in consequence taken in the House of Commons by Lord Houghton, which led to the preparation of a draft convention between Sir George C. Lewis and the United States Minister, Mr. Dallas. But shortly afterwards the Civil War broke out in America, and since then the matter has slumbered. The present time seems most opportune for reviving it. And I think it well deserves consideration whether a remedy more complete than extradition should not be resorted to in these cases, as that must, from the difficulty of furnishing the requisite evidence, be at best inefficient. Each country might, perhaps, entrust the punishment of extradition offences committed on the high seas to the Courts of the other when the vessel on which they were committed arrives in one of its ports. And any possible abuse would be sufficiently guarded against, if such a trial could only take place at the request of the Minister or Consul of the State to which the vessel belonged.

Let us hope that the question pending between the two countries may ere long be happily set at rest, and that the controversy may result in a settlement on some broader basis, and with more extended and beneficial provisions than before, for it is to our common interest that crime should not go unpunished, and that the protection of the criminal law should be as extensive in its domain as the possibility of its violation.

It may be thought by some that my Address has been

hardly befitting the dignity of my position on this occasion ; that as President of the Jurisprudence Department, I ought to have soared into higher regions, been more scientific and less practical. It must be remembered, however, that this department in terms concerns itself with the Amendment of the law, and that the object of this Association is, if I understand it aright, eminently practical. And it seems to me that there is no branch of social science where its services are more needed, and where it is calculated to effect more good, than in that which deals with the defects of our law and the direction which its amendment should take. It has, I know, often been thought strange that, with so many lawyers in the House of Commons, so little has been done in the way of removing evils which all intelligent members of the profession are conscious of and deplore. But those who may be apt to blame us for our inaction and want of public spirit are very little aware of what the attempt of a private member to carry even the simplest and most modest measure of reform involves. Let us suppose that a Bill has been introduced which commends itself to the good sense of almost the whole House, it is open to a single member to put down notice of opposition to the Bill : when this has been done it cannot be proceeded with after half-past twelve o'clock at night, and the member in charge of the Bill must remain in the House wearily waiting, on the chance that ere that hour arrives his turn may come, and his Bill be proceeded with. But he waits most likely in vain, the magic hour arrives before the Bill is reached, and there is nothing for it but to put it down on the order book for a subsequent evening and repeat the same process again. And he may have to repeat this process many a night ere the Bill is safely read a second time. Even when this has been done and its principle affirmed, he is still far from smooth water. There remain two, or probably three stages, at which the same tactics of opposition may be adopted, and the same weary watching be required. All this obstruction, too, may

be effected by a single stupid or obstinate member, and as I mention no names, I trust I shall be pardoned for saying that there are a few members who combine both these qualities. He must be a man of almost superhuman perseverance who, in spite of all this, carries his Bill, and not unfrequently, after all his display of patience and perseverance, the member fails of his object at the last moment. The result is, that it is to the Government that we must look to introduce measures of law reform if they are to pass into law, and this is not a very hopeful prospect. Law reforms, as a rule, excite but little public interest; there is little credit or glory to be gained by passing them. With the Ministry, as with other people, the supply is apt to accommodate itself to the demand. Those measures are pressed forward for which there is some public cry, or which it is thought will gain some public applause. And thus more modest, but often more useful, reforms are thrust aside into a subordinate position, postponed, and often at last abandoned, for the sake of measures which seem to afford (and it is often little more than seeming) some immediate public benefit. For this I see no remedy—in the absence of a complete reform of the proceedings of the House, of which there seems no hope at present—but to excite, if it may be, public interest in the cause of law reform; to make it cease to be at all a lawyers' question, and to create a demand which the Ministry of the day shall find it to their interest to supply. If, for example, in this great commercial centre, men came to feel that it would be a great boon to have our law simply and intelligibly expressed in a Code, and set themselves to work in earnest to demand it, believe me, it would not be long before their object was attained. What this Association seeks to do, then, is to impress upon you the importance of such matters, and to induce you to bestir yourselves about them. You may thus give an impulse to public opinion of the most beneficial character, and create a force which will effectually carry through long-needed but long-neglected

reforms. If in any degree this result should follow from this meeting, it will not have been held in vain, and future Presidents, filling more worthily the position which I occupy to-day, may have not, as I have done, to lament almost despairingly the hopeless aspect of law reform, but to celebrate triumphs achieved, and rejoice over benefits won, which shall add to the security of life and person, property, and character, and increase the comfort and well-being of the nation.

II.—STUDIES THAT HELP FOR THE BAR.

PART III.—RHETORIC.

I HAVE reserved the chief space of this final paper for the subject of Rhetoric, but the subject would require a whole volume in order to discuss it fully. I may, however, be able in a limited number of pages to give some useful hints on it; and the strange dearth of serviceable treatises on this very important and interesting branch of forensic qualifications, gives me an additional reason for devoting as much attention to it as possible.*

* Some degree of skill in public speaking is desirable, and almost necessary, not only for the lawyer and the politician, but for every member of a free community, like the English, in which the system of local self-government is extensively prevalent; if he wishes to be able to protect his own interests, and those of his neighbours, and to exercise a fair share of influence over his fellow-men. Indeed, it is frequently wanted even in private life, when a man has to stand up to make a complimentary statement or proposal about others, or to acknowledge similar compliments to himself. So, too, in literary and scientific discussions, the best informed person may totally fail in doing justice to the subject, or to himself, if he wants fluency and the power of arranging his arguments. An instructive anecdote as to this is told in Smiles's "Life of George Stephenson." In endeavouring to inform a company of some point in engineering, he was encountered by a person who knew nothing about the subject, but who could readily and easily talk. The result was that Stephenson, full of genius, but deficient in power of expressing himself, was completely beaten in the argument. But, on explaining himself on the following day to Sir William Follett, that gentleman afterwards encountered his loquacious adversary, and so entirely overcame him that Stephenson remarked—"Of all the gifts ever given to man the gift of the gab is the best."

The dreadful duty of Definition meets me at the outset. I fulfil it as follows :—

Rhetoric is the art of influencing by words men's wills, feelings, and opinions.

The common short way of describing Rhetoric is to call it the "Art of Persuasion." I should have been quite content to adopt this as intelligible and sufficiently comprehensive, if it had not been objected to by many, of whom Aristotle is the great leader.

Space will not allow me to consider the objections *seriatim*. Suffice it to say, that in the definition, which I have framed, the art of Influencing may be fairly held to apply to cases where the Rhetorician attempts, but fails, to persuade, as well as to those in which he is successful. I have also marked the distinction between influencing by words, and influencing by acts, such as by setting an example to follow, or by exhibiting a repulsive line of conduct, which might naturally be avoided. The main distinction which it is necessary to draw, is between, 1st, Rhetoric, which applies itself to inspire, to guide, to check, or to modify volition; and, 2nd, Dialectic, which applies itself to convincing by hard dry reasonings. This distinction is drawn by stipulating that Rhetoric is to influence the Will. The Logician (and the same is the case with the Mathematician) seeks only to command the judgment. The Rhetorician wants to do something more than to gain the assent of the understanding, an effect, which (so far as he regards it at all) is valued by him as an instrument, and not as an end. He wants an action, or a manifestation of the Will, which is generally desired to be speedy; but sometimes the speaker is satisfied if he creates in his hearers a predisposition to act as he wishes, whenever the time and opportunity for such action may arrive. A Rhetorician will frequently employ Dialectic; for, it is mostly difficult to rule a man's will, unless you make him think that to some extent you have reason on the side which you wish him to adopt, and which you must make him wish to adopt as his own.

But there are other modes which are used in the Art of Rhetoric for swaying the opinions and feelings of an audience. You may effect this to a considerable amount by giving information as to new facts, or by controverting supposed old facts, or by arranging facts, old and new, in different combinations. You may gain this end partly by the powers of the imagination, and you may do it most of all by getting men's sympathies on your side, and by exciting or quelling their passions. Rhetoric deals with both the head and the heart; but it is in the world of the heart that its greatest victories are gained.

It has been pointed out that Rhetoric exercises its influence by means of words. The first care, therefore, of him who would be a master of the Art, is to acquire an ample and effective stock of words, and to be ready and adroit in their employment. Our English youth, who aspires to be a successful orator in the Senate, or at the Bar, must be fluent and accurate, energetic, and graceful; and, above all, he must be lucid in his English.

I have already in this Essay* spoken of the importance of early training at home, and in school to the right use of the mother-tongue; and also to the value of the innovation in the system of our great educational establishments, by which the scientific study of the English language is made an essential part of instruction, instead of the lad being left to pick up his vernacular by the light of nature, and according to the surrounding *voces populi*.

I now will attempt some further and more practical directions as to how the "*Copia verborum*," such as the orator needs, may best be acquired. Most of what I have to say on this, will consist of advice "What to read;" but I must add something about the habits of composing, analysing, and common-placing, which should be combined with judicious reading. I am not at present going to discuss what

* See *Law Mag. and Rev.* for February last, No. CCXIX. (2nd edit.), p. 290, *et seq.*

works of orators, ancient and modern, are to be preferred as models. This more ambitious part of our theme may be dealt with better when other matters have been previously considered.

“Use the pen: it keeps the mind from staggering about.” I read this sentence many years ago in some periodical, of which I have long forgotten the name and date; but I have never ceased to value the maxim. It expresses perfectly the beneficial effects of taking notes of what we read, of writing summaries of books and arguments, and of occasionally drawing up little essays of our own, with references to the authors whom we have been reading. It matters comparatively little what becomes of our youthful manuscripts. They may be lost or burned within a day after they are written, but the benefit of the process of writing them will remain in our brains. It is when we begin to write that we chiefly detect, and are led to cure, our own blunders and imperfections. A man may know a great deal about a subject, and yet not know it. When he has to employ his information, he finds great gaps and stumbling-blocks. His mind “goes staggering about.” But when his pen has pioneered the way, he advances with sure step from one position to another, and he has firm foothold, whence (if needful) he can wage controversy. It is hardly necessary to repeat here Lord Bacon’s aphorism, that “Reading maketh a full man, conference a ready man, and writing an exact man.” I will quote to you two or three more authorities (and they shall be experts) on the special advantage which a Rhetorician derives from habits of written composition. The old Greek writer on Rhetoric, Theon, in a passage cited by Professor Jebb,* warns us that “Even as for him, who would be a painter, it is unavailing to observe the works of Apelles, unless he tries to paint with his own hand; so for him, who would become a speaker, there is no help in the speeches of

* Jebb’s *Attic Orators*, vol. i., Introduction, p. lxxv.

the ancients, in the copiousness of their thoughts, or in the purity of their diction, or in their harmonious composition, no, nor in lectures upon elegance, unless *he disciplines himself by writing from day to day.*"

Cicero attests that "*Stilus optimus et præstantissimus dicendi effector et magister.*"* Lord Brougham says, "I should lay it down as a rule, admitting of no exception, that a man will speak well in proportion as he has written much."† Let me add the example of Pitt, to prove the utility of what are generally known as "common-place books." Pitt's biographer, the late Lord Stanhope, tells us that when a student at Cambridge, as well as in his boyhood, Pitt kept up a habit of copying any eloquent sentence, or any beautiful or forcible expression which occurred in his reading.

The same great orator may be cited on another matter, in favour of that system of combining the study of English and the study of the classics, which I have recommended in the earlier part of this essay. Lord Stanhope, in his memoirs of Pitt, mentions that his own father, then Lord Mahon, while residing with Mr. Pitt at Walmer Castle, in 1803, ventured on one occasion to ask him by what means he "had acquired his admirable readiness of speech—his aptness of finding the right word without pause or hesitation." Mr. Pitt replied that, whatever readiness he might be thought to possess in that respect, was, he believed, greatly owing to a practice which his father had impressed upon him. Lord Chatham had bid him take up any book in some foreign language with which he was well acquainted, in Latin or Greek, especially. Lord Chatham then enjoined him to read out of this work a passage in English, stopping where he was not sure of the word to be used in English until the right word came to his mind, and then to proceed. Mr. Pitt stated that he had assiduously followed this practice. We may conclude that at first he had often to

* *De Oratore*, i., ch. 33.

† Lord Brougham's *Speeches*, vol. iii., p. 81.

stop for a while before he could recollect the proper word, but that he found the difficulties gradually disappear, until what was a toil to him at first, became at last an easy and familiar occupation.

The same biographer tells us that Pitt, when at Cambridge, continued the same practice of extemporaneous translation which he had commenced under his father. His favourite authors were Thucydides, Livy, and Sallust, especially the speeches in them.

I have already mentioned that Lord Chatham himself ascribed his own readiness and felicity as an orator in the choice of words, to the practice which his own father had taught him in early life, to read every day over to himself some passage in the classics, and then to translate it aloud and continuously into English prose.

Charles James Fox, the great antagonist of the younger Pitt in "the eloquent war," almost surpassed his rival Statesman in vehement fondness of the classics. Fox not only read the master-pieces of Greek and Roman literature extensively, and acquired from them "that exquisite taste which familiarity with the classics bestows,"* but he read with critical accuracy: he made himself not merely a scholar among statesmen, but a scholar among scholars. He kept up these studies throughout life. His biographer has preserved an excellent letter of his, in which he recommends the same course to a friend who had been his private secretary, and who had begun to read for the Bar. Fox says, "Now that you are *hard at it with the law* I ought not, according to common notions, to answer your questions about Æschylus, &c., but I am of opinion that the study of good authors, and especially poets, ought never to be intermitted by any man who is to speak or write for the public, or, indeed, who has any occasion to tax his imagination, whether it be for argu-

* The phrase is Lord Brougham's.

ment, for illustration, for ornament, for sentiment, or any other purpose."

The scientific instruction, which is now almost universally given as to the sources and development of our own language, makes it familiar knowledge that the Anglo-Saxon (which was the product of numerous kindred dialects brought here by Teutonic and Scandinavian warriors) is the primary element of our modern English tongue. The other chief element is generally called the Latin, though a very great part of it came to us not immediately from the Latin, but from the French and the Italian. Of these elements the Anglo-Saxon is not only the first in essential and etymological importance, but it is incomparably the best; and it will always predominate in a good style. Simple, short, yet full of meaning and power, the homely old English words go straight to the heart, and their rhythm is sweetest music to the ear. But it is absurd to deny the advantages which our large command of words drawn from other modern tongues, and from the classics, offers to the author, and still more to the speaker. The best rule is to use always Anglo-Saxon words, where they sufficiently express your meaning, and if the sentence made up from them is not likely to jar on the hearers as uncouth, or to give offence as affected and grotesque. If a word, or a number of words of Latin origin, will convey your ideas more readily, more precisely, and more fully—if by the introduction of such words an "*Invenusta repetitio*" can be avoided—if by means of them you can gain the advantage of repeating an argument while your tautology is disguised—if you can even so improve the general melody of your sentences; why, use the Latin department of the language freely, and do not slight the bounteous variety which the affluence of modern English places at your disposal.

Closely connected with the subject of forming a style, in which Anglo-Saxon words are much more used than Latin, is the subject of general length of sentences. As a rule, you

will find that Anglo-Saxon words, when little mixed with others, arrange themselves naturally in shorter groups, than is the case when a great proportion of words of Latin origin are employed by the composer. And, as a rule, the short-sentence style is far more telling than is the style, which arrays itself continually or principally in lengthy and elaborate periods. When, as is often the case, a Latinized system of Syntax is super-imposed, things are made worse. It is, indeed, almost distressing to a hearer to have to listen to copious strings of accumulated, but inter-dependent propositions, exceptions, parentheses, illustrations, and contrasts, the purport of which is not disclosed till the very end of the bewildering coil. It is as bad as reading German prose. The only instance that I know of a great English orator conspicuous for the frequent length of his periods, is the younger Pitt. But, in his case, the embarrassing effect of the "long drawing out" of the linked phrases is mitigated by the speaker's felicitous choice of words, the perfect accuracy of his grammar, and the unexceptionable force of the dialectic. A style more dignified than usual suited the somewhat imperious position, which Pitt assumed and maintained throughout his Parliamentary career: and, even as to him, we feel when we study his speeches that he would have been more effective if more frequently laconic. But, unquestionably, brevity of sentences, like the preference of Anglo-Saxon words, may be pushed too far. The Rhetorician must speak so as to please, if he would speak so as to win. It was early observed by the ancient masters of the art that Rhetoric requires variety of style, and that the graceful and impressive speaker must be able not only to "pack thoughts closely and symmetrically," but "to bring them out roundly and harmoniously." *

* Such seems to me to be the full meaning of the celebrated phrase in which Dionysius Halicarnassensis describes the style of Lysias—*Ἡ συστρέφουσα τὰ νοήματα καὶ στρογγύλως ἐμφέρουσα λέξις*. It is quoted, with comments, by Professor Jebb in his late admirable work on the Attic Orators.

I will next offer some remarks on the English authors, whom it is most beneficial to study earnestly and repeatedly for the sake of acquisition or improvement of style. I shall elsewhere advert to the extant speeches of orators of our own and other nations, which the student should use as models in all departments and for all purposes of Rhetoric. At present, I must deal chiefly with the topic of language; although it is impossible to disconnect that topic from the consideration of how far each author aids us in forensic training by reason of the nature of his thoughts, as well as by his manner of expressing them.

For manly, vigorous diction, our Elizabethan dramatists

Professor Jebb, in the same work (vol. i., p. 32), has some remarks which I gladly copy, on the introduction by the Attic Rhetoricians of the elaborate composition of "that more artistic period, of which the several parts resemble the mutually supporting stones of a vaulted roof, and which leads the ear by a smooth curve to a happy finish," (p. 35), instead of the more rough, running sentences of the first prose writers. He says, "It is perhaps impossible to find English terms, which shall give all the clearness of the Greek contrast between *περιοδική* and *ἑρμομένη λέξις*." The "running" style, as *ἑρμομένη* expresses, is that in which the ideas are merely strung together, like beads, in the order in which they naturally present themselves to the mind. Its characteristic is simple continuity. The characteristic of the "periodic" style is that each sentence "comes round" upon itself so as to form a separate symmetrical whole. The running style may be represented by a straight line, which may be cut short at any point, or prolonged to any point: the periodic style is a system of independent circles. The period may be formed, either, so to say, in one piece, or of several members (*κύματα membra*), as a hoop may be made either of a single lath bent round, or of segments fitted together. It was a maxim of the late Greek Rhetoric that, for the sake of simplicity and strength, a period should not consist of more than four of these members or segments; Roman rhetoric allowed a greater number. Aristotle says, "that a Period must be of a size to be taken in at a glance."

This last citation is from Aristotle's "Rhetoric," iii. 3. It is well to read on the subject of Periodic construction Mr. Cope's comments on Aristotle's "Rhetoric," p. 306-316. He refers appropriately to our English writers, Harris, "Philosophical Inquiries," Pt. 2, ch. 4, to the excellent observations on the Period in Campbell's "Philosophy of Rhetoric," Book iii. c. 3, s. 8, and to Archbishop Whately's Essay on Rhetoric in the "Encyclopædia Metropolitana," ch. iii. p. 286, &c. See also the small separate edition of Whately's "Rhetoric," p. 205.

are unrivalled;* and, though an orator does not want to declaim either rhymed or blank verse, there is very much affinity between Rhetoric and Poetry, especially Dramatic Poetry: inasmuch as the special functions of Dramatic Poetry are to embody and to animate the thoughts, the fancies, the feelings, and the passions of the heart in all varieties of human life.

* Many of the writers, whom we commonly speak of as "Elizabethan," produced their best works during the reign of Elizabeth's successor; and some did not publish anything prior to that time. But still it is accurate to speak of them as "Elizabethan:" for they had been educated among the men, and with the feelings, of the three glorious decades that closed the sixteenth century. The mental and moral impulses, which were called into action during the life of the Great Queen, did not lose their force when she ceased to exist.

Several modern critics have discussed the causes which developed and influenced the literature of that marvellous epoch. No one, to my mind, has written on them better than Hazlitt, in his "Lectures on the Elizabethan Dramatists," which were very popular thirty or forty years ago, but now seem to have dropped into unmerited neglect. Hazlitt gives as "the causes which moulded and stamped the poetry of the Elizabethan era: first, the recent Reformation. This event agitated the mass of accumulated prejudices throughout Europe. . . . The war and clashing of opinions, loosened from their accustomed hold, might be heard like the noise of an angry sea, and has never yet subsided. . . . Men's brains were busy, their spirits stirring, their hearts full, and their hands not idle. Their eyes were opened to expect the greatest things, and their ears burned with curiosity and zeal to know the truth, in order that the truth might make them free."

"The translation of the Bible was the chief engine in the great work. It threw open the rich treasures of religion and of morality. It revealed the visions of the Prophets, and conveyed the lessons of inspired teachers to the meanest of the people. It gave them a common interest in the common cause. Their hearts burned within them, as they read.

"We perceive in the history of this period a nervous masculine intellect: no levity, no feebleness, no indifference. There is a gravity approaching to piety, a seriousness of impression, a conscientious severity of argument, an habitual fervour and enthusiasm in their mode of handling almost every subject." Hazlitt then gives proofs of the influence exerted in the same age over Englishmen by the revived study of the classics, and by familiarity with the masterpieces of modern Italian literature. He adds, that "of the time that we are considering, it might be said without much extravagance that every breath that blew, every wave that rolled to our shores, brought with it some accession to our knowledge, which was engrafted on the national genius." To all this, we are to add the daring boldness and the activity then given to men's courage and imagination by the discoveries of the New World, and of its marvels; and, above all, the ennobling influence of England's successful resistance to the invasive tyranny of Spain. This told on our literature, as the successful resistance of Athens to the Persians told on the literature of the Periclean age.

One name stands out pre-eminent in our dramatic literature. It is superfluous to recommend the study of Shakespeare to a lawyer, for he must have Shakespeare (as the saying is) at his fingers' ends, unless he would disgrace himself by obvious inferiority to all, whom he meets in court and elsewhere, who have any pretensions to be called educated men. A quotation from Shakespeare never sounds pedantic to English ears, and it is always discreditable not to recognise it. But many quote him, who do not quote accurately, or appropriately; and you may gain an immense advantage over an adversary by detecting and exposing a blunder as to the wording of Shakespeare's lines, or as to the *Dramatis Persona* in whose mouth the words were placed. Often also you may retort with crushing effect by adding another speech from the same dialogue, in which Shakespeare makes another character of the play confute or ridicule the sentiment expressed in the passage just repeated by your opponent. Or you may point out that the passage, though fair-sounding in itself, is placed by Shakespeare in the mouth of a vile and villainous personage. Iago's eulogy on the worth of a good name supplies an instance of what I mean. But all these controversial advantages of a perfect knowledge of Shakespeare are small in comparison with the intellectual benefit of imbuing yourself, as far as possible, with the spirit of the greatest master and of the most vivid pourtrayer in all literature, ancient or modern, of the passions and feelings of the human heart in every region, in every time, in every mood, and every variety of circumstance, station, rank, and age.

The other Elizabethan dramatists are dwarfed by comparison with Shakespeare, as the presence of Achilles dwarfs the other Homeric heroes of the Iliad. But they form a bright and glorious band, such as any nation might be proud of, even if she could not point to a few single stars of still superior magnitude. They well repay attentive study. But I am bound to remember that I am advising men who study

for a definite purpose, that their ulterior purpose is not literary but forensic, and that their time for such auxiliary art is limited. The Dramatists of this period are so many, and their works so voluminous, that the best part of a life-time might be spent before they were mastered. Take Charles Lamb's "Specimens of the old Dramatists." They are extremely well chosen, both as showing the characteristics of each author, and for the sake of the beauty and force of the extracts. They will probably lead you to select some of the best of the dramas to read through, and your own taste may guide you in the selection.

Recollect that neither with regard to the Elizabethan, nor any other model writers, should you study with indiscriminate imitation. I have spoken before* of the obscurity which frequently deforms the early portions of our literature. Notice this, but notice it as a warning what to avoid.

Great advantage will be gained from close and repeated study of portions of Dryden's and of Pope's works. Much of them, indeed, should be got by heart: and the task of doing so is a labour of love; for the strong, sinewy rhymes cling marvellously to the memory, and a thousand incidents of daily life remind us of their sterling, though often bitter truthfulness. However deficient in some poetical qualities these two authors may be, they shine in others, which it is specially valuable for an orator to acquire. The smiting sway of impassioned argument in Dryden, the shrewd keen sense, the unfailing intellectual buoyancy of Pope, with the marvellous grace and dignity of their diction, make them admirable models for him who would rule by his words the minds of others. I recommend in Dryden the poems only of what is called his Second Period, comprising among other things the "Religio Laici," the "Mac Flecknoe," and, above all, the "Absolom and Achitophel." Add to these the first book of the "Hind and Panther," the opening

* See *Law Mag. and Rev.* for February last, p. 295.

lines of which have been regarded by many good judges as the most exquisite specimen in the language of pure, melodious, forcible English. In Pope take for special study the Satires and the Epistles, with their Introductions and Epilogues. I strongly recommend an additional study of "The Dunciad." Much of the interest of this satire has passed away, now that the obscure band of personal enemies, whom Pope chiefly attacked in it, have sunk with their writings into oblivion. But this is far from being the case with the whole poem: and for deadly sarcasm, for exhibiting an adversary in a ludicrous or degrading light, for gibbeting false pretenders to fame, whether fribbles or pedants, the "Dunciad" is, to my mind, a splendid monument of genuine rhetorical genius.

Pope prided himself on "correctness" as his characteristic merit. He had a right to do so; but correctness was the general attribute of all the Queen Anne's men, as the remarkable group of writers have been called who flourished during the first thirty or forty years of the last century. I should only repeat what all my readers must have seen recommended by others of far more authority, if I were to give detailed reasons for the careful study of Addison and Swift; but there is one great writer of this epoch, whose works are now so much neglected, that I must devote a few sentences to them, for I believe that they are the finest models as to style to be found in our literature. I say emphatically "as to style," for I am not concerned here with the merits or demerits of the writer's politics or doctrines. I mean Lord Bolingbroke.* I unhesitatingly place him at the head of all the prose writers in our language. Hooker, Milton, Jeremy Taylor, and others of our old authors may have finer bursts of sublimity and pathos in their most poetic prose; but these are *purpurei panni*, to be sought for among heaps of rugged sentences, harsh metaphors, and grotesque conceits. Boling-

* I may ask permission to refer here to what I have written on Bolingbroke in "The Memoirs of Eminent Etonians."

broke never thus shocks the taste; while for page after page he charms us with the fertility of his imagination and the varied richness of his majestic mind. He is clear and nervous as Swift, without Swift's plebeian meagreness of style. He has Addison's elegance without his tameness. He has Johnson's sententious grandeur without his pomposity. He has sarcasm as stern as that of Junius, but he has also descriptive powers; he has a skill of varying his tone and manner; he has a graceful facility and judgment in the introduction of passages of repose, such as that celebrated railer never displays. Above all, Bolingbroke's writings (unlike those of Lord Macaulay) have the charm of never bearing the appearance of any effort analogous to that of getting up the steam. His intellectual strength is like the strength of the living body, ever present, and ever ready for free and unartificial exertion. So too of his diction: his contemporary, Lord Chesterfield, confessed that till he read Lord Bolingbroke's writings, he did not know all the extent and powers of the English language; and that Lord Bolingbroke's eloquence was not a studied or laboured eloquence, but a flowing happiness of expression. Lord Mahon* truly says that "The greatest praise of Bolingbroke's style is to be found in the fact, that it was the study and the model of the two greatest minds of the succeeding generations—Mr. Burke and Mr. Pitt. The former, as is well known, had so closely imbued himself with it, that his first publication was a most injurious, and, to many persons, most deceptive imitation of its manner. To Mr. Pitt it was recommended by the example and advice of his illustrious father, who, in one of his letters, observes of Oldcastle's Remarks [a series of historical attacks on Sir Robert Walpole, written by Bolingbroke under that title,] that they 'should be studied, and almost got by heart, for the inimitable beauty of the style.' Mr. Pitt, accordingly, early read and often recurred

* The Lord Mahon of this extract is now better known as the late Lord Stanhope.

to these political writings ; and he has several times stated in conversation to the present Lord Stanhope, that there was scarcely any loss in literature which he so deeply deplored, as that no adequate record of Bolingbroke's speeches should remain. What glory to Bolingbroke, if we are to judge of the master by the pupils ! ”

Lord Brougham has eulogised Bolingbroke's style in terms equally strong. I would advise any reader who wishes to satisfy himself as to the true position of Bolingbroke as a writer, to consider, first, what are the two great elements of our language ; and whether excellence in writing English must not consist in combining and judiciously employing the peculiar beauties and resources of each of these elements. Then, read Bolingbroke's letter to Sir William Wyndham, and the two first of the “ Letters on the Study of History,” and ask yourself whether you would wish to have more complete or more graceful specimens, either of the simple pure strength of the Anglo-Saxon, or of the dignified copiousness of the Latin part of our language.

I could much expand this part of my essay, if I were to comment on, or even merely to mention all the writings which a forensic student may usefully study ; and still more would this be the case, if I were to assign my reasons for omissions. But I am trammelled by limits of space ; and I have sought only to name a few authors, who certainly may be studied with pre-eminent benefit, and may be studied without consuming an undue proportion of the available time of our *Propositus*.

For Treatises on Rhetoric, that are both scientific and practical, we still must chiefly have recourse to the classics. Campbell's “ Philosophy of Rhetoric ” is very valuable ; but it is far from dealing with the whole of the subject, and it has a good deal of verbosity and repetition as to the portions which it does discuss. But it ought to be read carefully. It would have been well if Archbishop Whately, in his “ Treatise on Rhetoric ” (first published in the “ Encyclo-

pædia Metropolitana," and afterwards remodelled and republished as a separate work) had not ignored Campbell so much as he has done. Whately's strong common-sense, and his keenness of observation, are conspicuous in his little book; and it contains very much which practising advocates, as well as students in preparation for the Bar, will find eminently useful. But it is not well-arranged, nor is it sufficiently comprehensive. Old Quintilian remains after seventeen centuries our fullest and best guide in the study. Our *Propositus* should make Quintilian a special book among his classics. Get an interleaved copy, and note in it all useful hints and advice from other sources about rhetorical training and improvement. The other best ancient Treatises are Cicero "De Oratore," his "Brutus," as he entitled the book "De Claris Oratoribus;" and his "De Inventione." Cicero himself, in his later writings, speaks slightly of the "De Inventione:" but I speak of it as being, as I found it, a very useful book for a practising young English barrister to read and to abstract.* I have often thought that Cicero's dislike to this essay of his youth is connected with the marvellous similarity between large portions of the "De Inventione," and the Rhetorical treatise called commonly the "Ad Herennium," which is generally printed among Cicero's works, but is certainly (and, I believe, undisputedly) the production of some other pen. Mommsen, in his customary Anti-Ciceronian zeal, praises up the "Ad Herennium," as far superior to anything written by Marcus Tullius. Without going this length, I would point out the "Ad Herennium" as well deserving our modern Rhetorician's perusal.

Among the Greek treatises on the subject, Aristotle's "Rhetoric" is paramount in merit. But though, of course,

* I will refer as specimens to the advice in it how to open an unpopular or weak case; about the mode of stating facts; on rousing indignation; on impulses and reasons; on the value of character; and on the probabilities or improbabilities of guilt arising from the Act itself. I carefully copied and epitomized all these, and many other parts of the book, and I often found them useful before London and Sussex Juries.

more original than Quintilian, and more suggestive of profound thought, it has not the comprehensiveness or the lucidity of the later Roman Master of the Art. But it ought to be earnestly studied; and the recent edition of it by Mr. Cope, with introduction, analysis, and illustrative notes, enables us now to study it with greatly increased facility and advantage. With regard to the other Greek writers on Rhetoric, as I am bound to be sparing in my demands on the time of my *Propositus*, I will refer him to the frequent extracts from them, and the excellent comments on them in Professor Jebb's lately published volumes on the "Attic Orators from Antiphon to Isæus"; a work, which I shall have to recommend for other reasons.

I have yet to mention one modern work on Rhetoric, small in bulk, but ample in suggestiveness, which is now, I believe, very little known; but which may teach a great deal; more, in fact, than an honest man would care to learn with a view of practising it himself, though it may be well to be forewarned of the risk of such practices being employed against him. I mean the "Parliamentary Logic" of the Hon. Gerard Hamilton, commonly called "Single-speech Hamilton," but most inaccurately, inasmuch as he made many good speeches in the English Parliament, and was afterwards for several sessions a regular debater in the Irish House of Commons. Hamilton gives precepts for obtaining success, with as complete a disregard to any distinction between "Fas" and "Nefas," as you will find in the worst passages which Plato puts into the mouths of the Greek Sophists, or in the speeches of the Athenian envoys in the Melian dialogue, or in the Principe of Machiavelli. But all the weapons, which he recommends, are not thus tainted; and no one can read him without owning his insight into character, his knowledge of how to say the right thing at the right time, how to make the most of an advantage, and how to mitigate or disguise the effect of having the sense and the merits of the case dead against you. Frequent reference

to him will be found in the little sketch of Rhetorical rules, which I am about to lay before the reader: a sketch, which in no way pretends to give a full and thorough view of a very large and complex subject; but which may help a student, by giving him hints to be used in the construction of a Rhetorical manual for himself: one of the most useful exercises which he can possibly engage in, and in which his interleaved Quintilian will do him yeoman's service.

The definition of Rhetoric has been already considered. It is the Art of influencing by words men's wills, feelings, and opinions. I believe that modern writers do well in retaining the old Aristotelian divisions of Rhetoric into three branches, "a division which is determined by the characters of the several kinds of audiences which the orator has to address, and by the end, which he has consequently to keep in view in each case."* The three branches are—1st, the Demonstrative, in which you pre-suppose that your audience already hold the opinions which you promote; so that no real issue is at stake, although you may wish to intensify their faith in opinions, and to procure an emphatic expression of their zeal in favour of them.† 2nd. Next comes the Deliberative, which is principally employed in addressing assemblies, more or less popular, on yet undetermined matters of public interest. The third branch (with which we are chiefly concerned) is Judicial or Forensic speaking, "*Judiciale aut Forense genus*." This is far the most complex. It pre-supposes, also, a trained adversary, whom you must credit with skill enough to make your task as difficult as possible; and it pre-supposes a judge, or a body of judges,

* Cope's Aristotle, Rhetoric, p. 118.

† This, the Demonstrative branch, is often treated as mere show-work and as little deserving of study. I do not think so. A speech of very great importance may be made in support of Resolutions at a meeting convened avowedly for a specific purpose, and composed entirely of persons pledged to certain views. Most, also, of what I would call "The Oratory of Private Life," and which every man ought to be able to go through creditably and plausibly, belongs to the Demonstrative Branch.

free to decide according to his or their reasons, belief, impulse, caprice, favour, or prejudices, on the cases, which you and your adversary can set up on either side.

As a rule, the partition of a Forensic Oration is fivefold. There should be the Proemium, the Narration, the Confirmation, the Refutation, and the Peroration. But there is no inflexible routine in these things; and all parade of formality should be carefully avoided. Everything should be made to appear natural, even when most artificial. *Ars summa est celare artem.* But, at the same time, you must not run the risk of offending the tribunal by seeming to take things too easy, and to have neglected proper preparation. Quintilian truly says that "*Odit Iudex ferè litigantis securitatem.*" The special use of the Proemium is to conciliate the favour of those whose verdict or decision you hope to gain;—to make your hearer "*benevolum, attentum, docilem.*" This, indeed, is to be an object throughout your speech; for, as Campbell remarks, "without some gratification in listening, the attention must inevitably flag." But it is most important to win favour on first introduction. For this purpose learn beforehand, if possible, the prevalent bias of your judge: watch acutely what kind of language, and what line of action seems to interest and please him, and what, on the other hand, seems to fall unheeded by him, or to be regarded with displeasure. As Sir James Scarlett phrased an old maxim, "Study the atmosphere of the Court." Yet, keep up always a show of firmness, and (as Quintilian warns you,) never betray any distrust of the goodness of your cause. A Proemium is not always necessary; and, if your case is frivolous or very frail, the less preface you cumber it with, the better. In such instances, you may often usefully take a starting-point from some incident that may have occurred in Court, or from any extraneous little event that you can humorously, and not ungracefully, connect with the work in hand.*

* See the *De Inventione*, i. 17.

The Narrative of the main facts of the case comes next in regular order. This should be lucid, brief, and have an air of probability (" *lucida, brevis, verisimilis* "). I may add that it should be given in a calm, though earnest manner. This is not the most showy part of a speech ; but it is one of the most effective. I well remember hearing Sir William Follett open the case for the defence in *Bogle v. Lawson*; an action for libel brought against the proprietors of *The Times* newspaper, in which a most daring and elaborate scheme for circulating forged Bank of England notes on the continent had been exposed. Follett traced before the jury, in sentences of apparent simplicity, but of consummate skill, every step in the movements of the conspirators, every artifice and manœuvre towards the execution of their plan, the main incidents which had aroused suspicion in various quarters, and every proof of guilt, which the sagacity and energy of the English journalists had obtained by costly researches made in every capital in Europe. Little facts (that is, little if taken separately), and seemingly unconnected, were brought together by the never hasting, never hesitating, never inconsistent speaker, and they were made to throw terrible light on each other. All this was done with almost judicial calmness, which gave tenfold weight to the words. All who heard it, felt that if the witnesses anything like sustained the opening (and from the fairness of the Counsel's manner all felt sure that such would be the case), the discomfiture of the Plaintiff and his comrades was an accomplished fact. We (I mean the barristers in Court not employed in the case) listened at the time like the lay audience, absorbed in the interest of the story, and forgetful of the advocate ; though we afterwards often admiringly talked over that exhibition of forensic excellence by the "*Optimus omnium Patronus*." There was another Counsel, whom of course I do not rank with Sir William Follett, but who was truly formidable for his skill in opening facts in a complicated and difficult criminal case. This was the late Sir William

Bodkin. He, too, was calm in manner, clear in expression, apparently frank and plain, but really most subtle in connecting circumstances, so that inferences fatal to the side which he spoke against were inevitable. When he prosecuted, he never alienated the jury, and he never gave his opponent an opportunity for an appeal to them by reason of any exaggeration or any display of zeal on the part of the Crown for a conviction. I say this from experience: for I have several times defended against him; and I know how I used to feel the ground cut away from under my feet, while he was speaking, and was quietly making good point after point, which destroyed all chance of my being able to establish the points, on which I had hoped to rear an effective though declamatory case for the prisoner.

Facts are proverbially stubborn things; but a skilled Rhetorician can often make them to a considerable extent subserve his will, by the manner in which he arranges them. Hamilton bids his pupil, in "Parliamentary Logic," "attend to the gradations of fact or of argument. The same things differently disposed have a very different effect." He warns him that "By speaking of events in the order in which they did *not* happen, you may change not only the appearance but the nature of them." Indeed there are cases in which it is an Advocate's interest to make his narrative as little natural as possible. It must often be slurred; though this should seem to be done accidentally. It must sometimes be given piece-meal, and mixed up with other parts of the speech, so that the mention of each unfavourable fact, which cannot be concealed and which cannot be qualified by arrangement, may be followed at once by the best apology for it that is possible (*ut vulnere præstò medicamentum sit, et odium statim defensio mitiget*.*) Indeed this mixture of statement and comment—*narratio* and *confirmatio*—is sometimes practised in fair but complicated cases. It was the general system of

* See the *De Inventione*.

Isæus, who "carried to a high perfection the combination of luminous recital with perspicuous reasoning."* But I believe that on the whole Hamilton is (rhetorically) right in recommending that "when the merits are with you, you should separate the fact from the argument; when against you, blend them." The same cynical critic of the Senate-house advises you, when you are in the wrong, to use comprehensive and general, because they are equivocal, expressions; and "to multiply divisions and distinctions without end." He also tells you that "Circumlocution is useful if you wish to deceive, and not otherwise."

Supposing your case not to be an inordinately bad one, and supposing the usual course of Rhetorical disposition of materials to be followed, the next branch of the speech is the "Confirmation," the building up of arguments to establish and strengthen your position. This is closely and sometimes inseparately connected with the next branch, which is called the "Refutation," and is specially applied to the demolition or weakening of the proofs which support the case on the other side.

I must, however, in dealing with these topics, carefully remember that I am not addressing myself to Barristers in actual practice, but to students in training for the Bar. And I therefore pass over here much that usually makes up the largest, and that is justly considered the most important, part of both "Confirmation" and "Refutation." I mean the subject of the examination, cross-examination, and re-examination of witnesses, and of the subjection of their testimonies, of their claim to credit, and of their probative values to such comparative Anatomy, and to such more or less comprehensive survey, as will be most favourable to the Advocate's purpose. Quintilian, when he comes in his fifth book to speak of "Confirmatio" and "Refutatio," says correctly that "*Maximus Patronis circa Testimonia sudor*

* Jebb's *Attic Orators*, vol. 2, p. 287.

est." His own admirable maxims on how to deal with witnesses are well-known; and by far the best part of Whately's Rhetoric consists of the chapters in which he discusses Testimony, the character and demeanour of witnesses, credulity, probability, and similar topics. I would refer also (if I ought to advert to these matters at all) to the excellent practical advice about witnesses, which is contained in Mr. Bliss' Lectures.* Much of course as to the mode and the spirit in which an Advocate should introduce, should marshal, and review his own proofs, and should confront those of his adversary, depends on the form of procedure and on the period of the trial, at which each address is made; whether before or after his own witnesses have been called; whether before or after his adversary's case has been heard; and on whether he has the last word or not. But while limited in the kind of remarks, which it is proper for me to introduce here as to the actual management of a case at the trial, I am free to observe that the value of skill in making the most of favourable proofs, and in depreciating those which are hostile to you, is not limited to Forensic Rhetoric, but is almost equally effective in the Deliberative Branch, which an English Advocate should never lose sight of; inasmuch as political eminence may always be hoped for by a successful counsel in a free country, where public opinion, formed and expressed in free assemblies, has powerful influence, and where "Ἔστ' ἐν λόγοις ἡ Πολιτεία." A similar remark may be made as to the advantage which the orator often has in addressing a Deliberative assembly, if he can lay before them a clear, graphic, well-ordered narrative of facts, which is "*Simplex munditiis*," and irresistible in its charms. I will refer, for example, to the renowned description by Demosthenes in the "De Coronâ" of Philip's advance on

* Lectures on Practice at Nisi Prius, by H. Bliss, Esq., Q.C., London: Rodworth and Sons,

Elatea, of the panic at Athens, of the next day's assembly, and of the subsequent proceedings and preparations.

I can here only give some general hints as to Confirmation and Refutation, drawn chiefly from the same writers, whom I have already been using. Hamilton is unscrupulous and clever as usual. He tells you, "Either overrate and aggravate what is asserted against you, and then you will be able to show that it is not true ; or, underrate it, and then admit it in a degree and with an apology." He repeats this maxim in substance more than once, and it is impossible not to feel that he goes the detestable length of training his young Debater to garble his adversary's words, but to do it discreetly. He says in one place, "In order to attack what others have said, or to defend what you have said, either omit a word, or add one ; or else change one word for another, a little softer, or a little stronger, as may suit your purpose."

The following maxims laid down by him are less objectionable :—"When a strong argument or a pointed answer occurs to you, do not come to it abruptly, or at once. It will have more effect to state first some reasons, which though less forcible, you may assert ought to be satisfactory, and then to bind up the whole as conclusive and irrefragable with your strongest argument." Pre-consider what you mean "should be the finest part of your speech : and, in speaking, connect it with what has incidentally fallen in debate : and, when you come to that premeditated and finest part, hesitate and appear to boggle : catch first at some expression that shall fall short of your idea, and then seem at last to hit upon the true thing. This has always an extraordinary effect, and gives the air of extempore genius to what you say."

"If you have no argument to object to, object to a word. Do not assent to anything on appearances, or on slight grounds. Guard every concession you make by some restriction. Let it always be an object to watch the concessions of your adversary, and improve them, and turn them to your advantage."

"The probability of a thing is in one point of view against its being true: for men are less likely to have examined into it."

"Men are more apt to amuse themselves by enquiring into the cause of a fact than to dispute it."

"When you cannot convince, a heap of comparisons will dazzle."

"Do not omit totally, but only throw into the shade the capital circumstances that make against you."

This last is much more shrewd advice than the recommendation of the old Rhetorician (supposed to be Anaximenes) whose treatise is usually published together with that of Aristotle on Rhetoric. The old sophist tells you to pass over what you cannot contradict or parry; and to go at once to safer ground. Many follow this plan from inability to do better; though, as Quintilian says, "*Stultissimè præcipitur quod defendi non possit silentio dissimulandum.*" Unless you have very stupid persons to decide your case (and unless in an English Court you can reckon on an unusually imperfect or feeble summing up by the judge), your reticence will be marked; and will give additional weight to the hostile topics. Refer to such topics with an air of candour and boldness; but do it briefly, baldly, and never allow them any prominence. Forensic advocates are not the only Rhetoricians who practice this device. It may often be found in Macaulay's History.

The list of Fallacies used in Debate is a very long one, as may be seen by looking at the Treatise of Aristotle called "Sophistici Elenchi;" and there are some not mentioned by the old philosopher. I shall point out three or four of the Fallacies that are most extensively and most mischievously practised; and I hope that it is almost superfluous for me to add that I point them out to our Propositus, not that he may adopt them, but that he may expose and baffle an adversary who has recourse to such unfair weapons.

There are two great classes of Fallacies. One consists of cases, where the same word or phrase is employed without explanation, first in one sense, and then in another. These are called "*Fallaciæ Dictionis*."* We must be all painfully aware of how much blundering and misrepresentation are caused by these (often unintentionally) even in common conversation. Whately warns us truly that familiarity with a word or term is a very different thing from having a clear apprehension of its meaning; and he cites appropriately the weighty remark of Lord Bacon, "Men imagine that their minds have the command of Language; but it often happens that Language bears rule over their minds." The best discipline against this mischief is that scientific study of our English tongue, of its etymology and syntax, as well as of its literature; and that habit of exercising ourselves in the composition of pure, accurate, and perspicuous English, which I have so often and so earnestly recommended. Logic will, no doubt, well repay in this matter all the toil which its students devote to it.

The same remedial studies will aid us from falling unconsciously into any of the other great class of Fallacies, and in discomfiting an opponent when he can be detected in them. These are commonly called "*Fallaciæ extra Dictionem*." The first that I will notice is the "*Petitio Principii*," or, in plain English, "Begging the Question;" sometimes also called "Arguing in a Circle." To designate it scientifically and fully, I should say that it occurs when an Advocate assumes from his premiss, that which is identical with the conclusion to be proved, but when he conceals the identity from his hearers. It might be supposed that Fallacies of this kind must be so transparent as to be ineffective. But this is far from being the case. Indeed, there is no other

* See Grote's *Aristotle*, vol. ii., p. 81. See and read carefully the chapter on Fallacies in Whately's *Logic* (not his *Rhetoric*), Book 3, especially section 10. See also John Stuart Mill's *Logic*, chapter on Fallacies.

form of Fallacy, by which a man so often imposes on himself.*

Another common Fallacy is that of treating one Fact as the cause of another Fact, because it accompanies it. This is called, technically, the "*Cum hoc ergo propter hoc*" fallacy; or the "*Non causa pro causa*." It is best illustrated and exposed by the old story of Tenterden Church Steeple and the Goodwin Sands.

Another Fallacy (often used in elaborate books as well as in off-hand speeches,) is when a proposition which is true respecting a person or a thing under certain circumstances, and with certain limitations, is treated as true absolutely and universally. This is called the Fallacy, "*A dicto Secundum quid ad dictum Simpliciter*."

The last of the Fallacies "*Extra Dictionem*," pointed out by Aristotle, that I shall mention, is the "*Fallacia Plurium Interrogationum*," which may be named simply "the Fallacy of Interrogation, viz., the Fallacy of asking several questions which appear to be but one; so that whatever *one* answer is given, being, of course, applicable to one only of the implied questions, it may be interpreted as applied to the other."† This is most frequently, and most dishonestly done in the examination of witnesses, and in comments on that examination made by Counsel when the witness has no opportunity of explaining himself.

There is one more "*Artifice*" which I must mention; and I prefer to call it "*Artifice*" to placing it in the dishonour-

* Whately's observations on this (*Logio*, p. 132, *et seq.*) are peculiarly good. He well remarks that "The English language is the more suitable for the Fallacy of *Petitio Principii*, from its being formed from two distinct languages, and thus abounding in synonymous expressions, which have no resemblance in sound and no connexion in etymology; so that a Sophist may bring forward a proposition expressed in words of Saxon origin, and give as a reason for it the very same proposition stated in words of Norman origin: *e.g.* "to allow every man an unbounded freedom of speech must always be, on the whole, advantageous to the State; for it is highly conducive to the interests of the community, that each individual should enjoy a liberty perfectly unlimited, of expressing his sentiments,"

† Whately.

able list of Fallacies, such as I have just been describing. I hope that it is not very blameable morally; for I must confess to having won many a verdict by it long years ago, when I had a considerable practice in defending prisoners. This consists of taking the proofs against your client one by one, and, if possible, in various parts of your speech. You urge upon the jury how insufficient the particular piece of proof is to justify them in taking away a man's life, liberty, &c., but you say nothing about the mass of proof collectively. This plan of action, when an advocate has a heavy case against him, is recommended by high authority. Quintilian says of hostile facts, "*Quæ turbâ valebunt, diducenda erunt:*" and "*Urgent universa: singula quæque dissolves.*" But it is a tactic to be tried only when you are in great difficulties; for it will be inevitably defeated by a reminder that the case is to be judged according to the general effect of the proofs in combination or in contrast with each other, and not merely by weighing separately each particle of testimony. The *Auctor ad Herennium* gives in his 4th book (chapter 41) a very powerful specimen of the argument in reply to the Artifice of Distributions. He calls this argument the "Frequentatio."

The last of the parts, into which a speech is commonly divided, is the Peroration. "Here," says Quintilian, "all the fountains of eloquence must be opened," and he warns us that the peroration must not be mere repetition. This is the place for working on the jurors' passions and feelings: reasonings and proofs should have gone before. He again urges the importance of thus winning the Judgment through the Will: "*Probationes efficiunt sane ut causam mostram meliorem esse iudices putent. Affectus præstant ut etiam velint: sed id, quod volunt, credunt quoque.*"*

* The whole passage on this subject in the 6th book of Quintilian is very fine. Hamilton, too, deserves attention again here. While attributing the greatest importance to the Passions, he is himself cynical and sneering to the end. He thus sums up the whole subject:—"Begin with an exordium to gain the good

Quintilian makes it a maxim that the Advocate must feel the Passions which he wishes to excite. The great critic gives advice how this is to be done. The speaker must be able at will and at discretion to conjure up before his mind's eye all the phantasizæ, all the minutizæ, as well as the main facts of the scene. He who can do this well, is what Quintilian calls *Ἐυφραντασίωτος*. We should say of him that he has a poetic temperament : and, unquestionably, the imaginative and representative powers of such a temperament, with the contagiousness of its fervour, are very valuable for an orator. And yet, he must not abandon his mind, as the poet does, to their inspiration. He must all the time have an inner self, where he calmly judges every event, and rules the springs of each manifestation of feeling. As you watch the conduct of causes, and still more when you come to take part in them, you will be more and more struck with the similitude between the qualities of a great general and those which are needed in a great advocate. Keen and rapid insight into human nature, the power of promptly comprehending masses of circumstances, the due blending of daring and discretion, the skill to change tactics according to the varying emergencies of the conflict—these are a few of the points of likeness. But pre-eminent is the necessity of perfect self-possession, of ordering the impulsive disposition, which is so natural to men of genius.

I was led to reflect on this by a passage, which I read lately in the "Memoirs of the First Napoleon," about the nervous and needless retreat of Marshal d'Etrées, at Hamelin, in 1757, when part of his line of communication had been suddenly broken and his original plans for advancing had been thereby disarranged. Napoleon observes that—

opinion and affections of the audience. State the point in question clearly, briefly, but artfully ; produce your proofs, your arguments ; then should follow your peroration, in which you recapitulate succinctly what is for your purpose. Enforce the strong points, and slip over the weak ; and then make a push at the passions of your audience ; at their pride, pity, or ambition, or their prevailing passions, whatever they may be, get *them* on your side, and you need not fear their reason."

"The first quality of a general-in-chief is to have a cool head, on which each object makes its due impression and no more. He must never become excited, and never turn aghast, or feel intoxicated by sudden news of either ill or of good. He must arrange the sensations which he receives, either successively or simultaneously, during a battle, and take care that each occupies only its merited place. Good sense and reasonable conduct are the results of numerous impressions, which all receive fair attention. There are men whose physical and moral constitution is such that out of anything that happens they construct a *tableau* of all that is, and is to be. Whatever may be the science, or the intelligence, or the courage, or the other good qualities of such men, they are naturally unfit to command armies and to direct the great operations of warfare."*

I have noticed similar indiscretions in Court. A witness suddenly turns adverse, or an expected point fails. Forthwith the advocate, a brilliant but over-zealous and excitable man, brings rapidly before his mind all the probable and all the possible ill consequences of the awkward event, and embarrasses himself by contemplating them, instead of calmly turning to other modes of continuing the controversy. Such men are often men of genius, but they are perilously wanting in forensic aptitude. A young advocate, who is conscious of such a disposition, should strive very hard to master it (and almost every mental tendency may be mastered), or else he had better change his profession.

The old Rhetoricians give copious instructions as to the Orator's Elocution, that is, on his conveyance by words of his thoughts to the minds of his audience; and they include, under this head, first, his Language, both as to etymology and as to style, and secondly, his Delivery, both as to utterance and as to action. I have already said much on the subject of language, and my limits do not permit me

* *Commentaires de Napoléon I., t. vi., p. 358.*

to resume the topic here further than earnestly attesting its importance, and recommending the student to read diligently what is written on it in the third book of Aristotle's *Rhetoric*;* in the third book of Cicero *De Oratore*; in the fourth book of the "Auctor ad Herennium," and in the 9th and 10th books of Quintilian. Among modern writers, Whately, in part three of his *Rhetoric*, gives many shrewd and serviceable observations; but on this matter the second book of Campbell deserves special study. He gives excellent rules accompanied with convincing reasons, about "the lawful authority of *Usus*, to which there is a general right of appeal from the laws and decisions of Grammarians;" about "Purity in English," and how it may be violated; about the all-importance of Perspicuity†, and the common causes of obscurity. I will add a few cautions to the young speaker. Be very sparing of Metaphors and Similes. Your style will seem uncultivated if they are wholly absent; but (as Corinna warned Pindar about Mythical episodes) "we ought to sow with the hand, and not with the whole sack." A false Metaphor, or a foolish Simile will give your opponent a terrible opportunity for raising a laugh at your expense; and the Orator, who is well laughed at, is ruined, at least for the case in hand. Practice variety in your speaking, both as regards words and tone. If your periods are in general copious and well-rounded, introduce now and then a short pungent

* See the excellent notes on this in Mr. Cope's Edition, pp. 277 to 331. You may add with advantage a re-perusal of what Professor Jebb in his "Attic Orators" has written on the style of Antiphon (vol. 1, p. 32); on the style of Lysias (chapter viii.); that of Isocrates (chapter xiv); and of Isæus (chapter xx). Mark also what he says about the causes of the "Depreciation of Style," in Greek prose after the times of Demosthenes (vol. 2, p. 438).

† Mr. Trevelyan's lately published *Memoirs of Lord Macaulay* give copious proofs of the laudable and successful pains taken by that great writer to make all his sentences instantly intelligible to what are called the commonest understandings. Indeed Macaulay's system of composition is a memorable example of the combination of the highest abilities with the most earnest industry. See especially Mr. Trevelyan's second vol., pp. 230, 235, and p. 224.

sentence with 'condensed meaning. This will fasten itself in your hearers' memories, and will tell on them when the recollection of your smooth ample phrases has passed away. These pungent bits may even be rough or quaint, so that they are striking. Alliteration may often be used effectively here. Many of Sydney Smith's and Cobbett's most successful sayings, which stuck like wasp-stings, owe half their success to alliteration. Antithesis, too, may be here well employed. But both Alliteration and Antithesis are to be used occasionally only, and with discretion. If you make them predominant elements of your style, you will poison it. Jokes also and facetious passages do great service, if they are not only good in themselves but well-timed. If systematic, they are detestable. Sarcasm and Irony are powerful weapons of much more frequent utility: but take care that your Sarcasm is not coarse or palpably ungenerous, and that your Irony is not so fine-drawn that common hearers will suppose you to be in earnest.

All that has been written here, and most of what you will read in Treatises on Rhetoric, presupposes great care and labour in oratorical preparation. The question arises (and it was asked of old) whether this assiduous habit of preparation may not unfit a man for extempore speaking; and, as all agree, the man who does not possess, and who finds that he cannot acquire the power of speaking off-hand with fluency and tolerable effectiveness when occasion requires it, had better give up the study of oratory. Read what Quintilian has written on this subject in his seventh book. He will teach you that long training (if wisely conducted) will not incapacitate, but will qualify you for the best possible exertion of your natural powers, when suddenly called into action. "*Ars semel percepta non labitur.*" And it is very rarely indeed that a man is called on to speak without having some warning before hand. A very short time for preparation will suffice for a skilful debater. You may think over, and may

arrange the bulk of your speech while you are delivering your proemiun; and some common-places, which you may easily remember, will serve for a proemiun. If, under such circumstances, you are a little slower than usual in your delivery, it will seem respectful to your audience:—" *Tardior pronuntiatio mōras habet, ut tamen deliberare, non hāsitare videamur.*" But, above all things, use whatever modicum of time you can gain, in determining, and, if possible, in composing your conclusion. Hamilton's advice on this is excellent. "Consider of your conclusion, that you may be ready to finish, whenever you may find it convenient." You should do this under all circumstances and for every kind of speaking. Without it all may be marred. For example, how common it is for a man in an after-dinner speech after winning favourable opinions by some clever and well-poised sentences, not to know how to finish gracefully, but to go maundering on with repetitions and platitudes, until he sets every one against him.

If you have more time, but not enough for preparing a complete speech, prepare and arrange your best possible sentences to be used in the most favourable and important parts of your subject. I have already quoted some advice from Hamilton showing how to introduce these " *Purpurei Panni* " to the best advantage, so as to disguise their artificial character, and make them seem natural portions of the whole speech.

Many indeed of our most effective modern orators have never done more in the way of preparation, than determine mentally the arrangement and tone of what they mean to say, and work up as well as possible such special parts as seemed likely to be most effective. Thus we read in Hoey's memoir of Plunkett that—

"Of the method of his public speaking he [Plunkett] told Shiel, who told George Henry Moore (so that the tradition reaches us through a line of orators accomplished in the art), that he always carefully prepared to the very syllable the

best passages, and the best only of his great speeches; and used these as a kind of rhetorical stepping stones, trusting to his native force and fluency for sustaining the style."

I ought now, in order to fill up my full plan, to discuss the comparative merits, as models, of the speeches of Plunkett, and many other modern Orators, as well as of the ancient. But to do this properly would require very many pages, and I am already out of bounds. I will only cite and recommend besides Demosthenes, the speeches of Lysias, Isæus, and Æschines, among the Greeks: the orations of Cicero, Pro Milone, Pro Flacco, Pro Fonteio, Pro Cœlio, Pro Cluentio, the orations against Rullus, and the

*Conspiciæ divina Philippicæ Famae
Volvitur a primâ quæ proxima.*

In English oratory I would specify Burke's Speeches in 1774 on American Taxation, his speech in 1775 on moving the resolutions for consolidation with the Colonists; Pitt's Speech on the Abolition of the Slave Trade, Grattan on the Declaration of Irish Rights, Erskine's Defences of Stockdale and of Hardy, Curran's Speech for Finnerty, Plunkett's summing-up of the evidence when he was Junior Counsel against Emmet, and Canning's Speech at Plymouth in 1823, and his Speech in the House of Commons on April 28th in that year on the Foreign Policy of England, and the chances of a general European war.

There has been great difference of opinion among able men as to the good and the ill effects of frequent and early participation in the sham-fights of debating societies. My own opinion is decidedly in favour of attending them, provided (and the proviso is very important) that the student always remembers the nature of the place and its proper purpose. Generally speaking, there is not the slightest practical interest felt in a debating society as to what may be the vote of the majority. The speaker is apt to think of nothing but of getting applause; and for this purpose he ranges, fancy

led, into all kinds of collateral topics, and is likely to devote an undue proportion of his oratory to saying smart things about the other debaters. This vice of wandering from the subject is a very pernicious one, as he will find when he has to speak in real earnest in after-life. The student, when at a debating society, should ever keep before his mind the fact that his purpose is not to win plaudits in that mimic encounter, but to get well trained for actual conflicts hereafter. He must keep to the strict purpose of the theme of discussion with unceasing watchfulness over himself. When used in this spirit of self-control, a debating society furnishes a young man with an education, such as it is impossible for him to get elsewhere, in readiness of speech, in delivery, and in the power of thinking while he is on his legs. I believe every exercise to be useful which aids in giving any of these qualifications. We know, for instance, on Lord Holland's authority, that Charles James Fox was in youth passionately fond of private theatricals. Those who share (or who have shared) in this fondness for the amateur stage, may hear with interest Lord Holland's opinion that those early tastes and habits were of great service to his illustrious kinsman on the stage of real life, by giving a familiar knowledge of our dramatic literature, which enriched his vocabulary and supplied him with an unusual store of apposite, though not hackneyed, quotations. Lord Holland adds that "his practice of acting was not less useful to him as an orator in the modulation of his voice." Lord Holland might have alluded also to the great advantage, which every one, who is destined to a career of which public speaking forms an important part, derives from getting used to the sound of his own voice, and from conquering early in life that terrible impediment to oratory which is so expressively termed "stage fright."

I have in the opening part of this Essay spoken of the continued study of Ethics as an indispensable part of the education which is to lead to the Forum, and as a requisite

never to be abandoned amid the toils and turmoils of the Forum itself. I wish, in conclusion, to repeat that statement, and especially the last part of it. However honourably an Advocate may practise his profession, the habit of arguing in favour of a pre-appointed conclusion, instead of letting the conclusion depend on a free and full examination of the arguments on all sides, has an unhealthy effect on the mind. Much of what Plato wrote in this respect about the rhetoricians of his age comes unpleasantly home to modern advocates.* In order to counteract as far as possible this evil influence, always keep up some line of study, in which you seek after truth for the sake of truth, and for the sake of truth alone. *Verum propter verum.* The exact sciences, the great sciences of natural philosophy—for instance, Astronomy, philology in her numerous departments—and many more domains of knowledge will give you ample choice for a worthy subject. Do this; and in your conduct also as to morality and religion, show that you appreciate the principles of the Jurists of old Rome, who taught that "*jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia*;"† and by whom its primary functions were recog-

* See, for instance, the "Thæstetus" of Plato, where Socrates speaks of the nobler position of the real lovers of Truth:—"We stand in pointed contrast with politicians and rhetors in the public assembly or Dikastery. We are like free-men: they, like slaves. They have before them the Dikasts, as their masters, to whose temper and approbation they are constrained to adapt themselves. They are also in presence of antagonists ready to entrap and confute them. The personal interests, sometimes even the life, of an individual are at stake; so that everything must be sacrificed to the purpose of obtaining a verdict. Men brought up in these habits become sharp in observation and emphatic in expression, but merely with a view to win the assent and approbation of the master before them as to the case in hand. No free aspirations or spontaneous enlargement can have place in their minds. They become careless of true and sound reasoning—slaves to the sentiment of those they address—and adepts in crooked artifice which they take for wisdom" (II. Grote's "Plato," p. 389). Sir Alexander Grant's second essay, near the beginning of the first volume of his recent edition of the "Nicomachean Ethics," deserves reference. At page 127 he says, very truly, "Rhetoric usually juggles the mind of the speaker as well as of his audience. It takes off the attention of both from examining the truth."

† Ulpian, as cited in the Digest I. i. 1.

nized as being "*erga Deum religio; ut parentibus et patriæ pareamus.*"* If my *Propositus* will school himself in this spirit, I have little fear as to his deriving untainted advantage from the advice which I have been bringing together respecting "Studies that help for the Bar."

E. S. CREASY.

III.—THE PUBLIC WORSHIP FACILITIES BILL. †

VARIOUS attempts have been made within the last few years towards what are called "Facilities of Public Worship," and, as might be expected, many fanciful proposals, and many wild schemes even, have been put forth. The subject has been much before Parliament; it seems not unlikely that some more effectual effort may be made in the next Session; and a calm consideration of it previously will not be unacceptable. We must set out on the principle that the facilities sought are according to the doctrines and discipline of the Church of England; and any improvement which may be judged practicable must be in that direction; in fact it is the extension of Church-of-England teaching which is endeavoured after. It is impossible it should be otherwise: Parliament cannot deal in any such respect in the interest of Dissenters. Our Church, from its connection with the State, has a right to claim from it facilities, and is also bound to assist in the carrying of them out. Thus there is a mutual obligation. The Parochial System has been established with this view. That System comprises all the means for Public Worship, and other religious services under

* Pomponius as cited, *ibid.* i. i. 2.

† "A Bill to provide Additional Facilities for the performance of Divine Worship according to the Rites and Ceremonies of the Church of England, 1876."

responsible care in individual districts, and thus both Minister and Church are confined to its use : the use of the Church and the services of its Minister are the property of each one, that is, so long as they conform to the legal directions under which they are established. Thus is each one entitled to equal care and advantage. But now comes the difficulty. It must have been evident to those who had foresight that the time would arrive when, from the increase of population, some change must be made in this state of things: the Church would become insufficient, and the labour would be too great for the Minister ; and this has in fact happened. So far as has been practicable, remedies have been applied. New Districts have been formed by the division and sub-division of Parishes ; new Churches have been built and additional Ministers have been appointed. All this has been well, but has not entirely, or even so far as it has gone, met the case satisfactorily : it has still left cause for just complaint, and not quieted the cry for what may not be so justly claimed. To take the first of these points. It is impossible, casting our eyes over the country, not to see the necessity if we would maintain for ourselves the name and character of a Christian Community, of doing something, indeed a great deal, towards making an effectual provision for Public Worship, and Personal Ministrations, in what may be called the out-lying parts and places. Notwithstanding all that has been done, and we acknowledge a great deal, spiritual destitution prevails to a vast extent. The Parochial System, originally sufficient and well adapted, now fails, if we may use the expression, in laying hold of every one. A Parish, without being of any great size, may now be ill supplied by its own Church, in which case there is really as much reason for forming a fresh scheme, as for that under which we are now living. The Law regulating all this was sound ; had it, however, contemplated our present condition, it would, undoubtedly, have laid down some prospective rules, and have set out some remedy or

resource. It would have made it a matter of course that for increasing wants increasing means should have been provided. We do not purpose to enter into one part of the question which has been raised, and which is as difficult as it may be by some considered important, viz., what method should be adopted for the satisfaction of any who may have differences with either the doctrines or the rules of the Established Church; so differing, they are free to apply means agreeable to their own consciences so long as they do not offend against public order, but they can claim nothing from an Establishment to which they give no submission—that is clear enough; such persons must be left to themselves. While, however, we say this, there ought to be neither endeavour nor wish to raise stumbling blocks in the way of any, or to interfere with that liberty of conscience which is the right of every Christian man. Let it not be supposed that any laxity of principle is contended for, or that any opening is sought for the encouragement of internal dissensions, or any approach to disunion. Our Establishment, indeed, is sufficiently wide, more so, perhaps, than may seem desirable to many. Thus, there is the less occasion for offensive action. It will be seen that all that is now intended, is to advocate the duty of the State, seeing it has thought fit to form an union with Religion, and to create what is called an Establishment, to present every one desirous of it with the means and opportunity of partaking in its advantages. It is the right, we insist, of every one, to claim the performance of the duty. The question is, How is this to be carried out? And that is what is now to be enquired into. It is, we must repeat, the undoubted right of every one professing to be a Member of our Church Establishment to assert his claim to be admitted to the benefits that have been provided for it; this is true generally, as to the Establishment itself; and it is true, also, we argue, as to its particular appliances. For the full and proper working of the Church, the Parochial System has been

formed ; it gave a Church, to which all within each Parish were entitled to resort ; it gave a Form of Service with it, to which, it might be reasonably concluded, all could give their assent ; and it set up a Minister, or Ministers, within each, to whose services, applicable not only in public performance, but in personal and private use, they could on all occasions apply ; in all those ministrations, and in everything connected therewith, everyone, without difference, was designed to participate. We may suppose that for a while these provisions answered all requirements ; the population being gathered within reach of the Church, the Church itself and its ministerial arrangements were adequate to the necessities of the day ; but now comes the difficulty, the population increased, the Churches became inadequate to the demand upon them, not only from the very circumstance of that increase, but likewise from settlements in distant portions of the parish. It is true that Chapels of Ease were frequently built in order to meet this want ; but, from the isolated position of many of them, and the inadequacy of the means for the support of the Minister, and from the unfitness which it must be confessed existed both as to the Minister, and the arrangement itself, spiritual wants still greatly prevailed. It is, moreover, to be admitted, that from time to time new Churches have sprung up, and even new Districts have been formed, and thus vast and most beneficial effects have been produced. Still the want prevails. Still Church room is called for, still additional Ministers are required ; and although much facility is given in these two respects, a great evil exists, there are numbers and numbers whom the Church and its Ministers cannot reach ; and it is said, with great truth and earnestness of complaint, “ why are not further and more effectual means set in motion by which we may enjoy equal privileges with our fellow Churchmen ? ” Now we come to the point. The Parochial System has not supplied all that it proposed, we mean ecclesiastically of course, we need hardly say, and it is at

least in accordance with the principles of reason and of right that some re-consideration should be taken. We do not wish to disturb proper rights ; but, in all public matters, where the public benefit and the public necessities cannot be met without some dealing with them, no resistance ought to be offered, while, on the other hand, no harsh or injurious interference ought to be practised. We have said that Churches have been built, and districts have been formed in large numbers to meet existing exigencies, but we, nevertheless, insist that exigencies do still exist to a large extent, and that obstacles do stand in the way of them which cannot be removed but by legislative authority : it is to such our purpose applies, and to the pointing out of a method by which they may be met.

In order to a more intelligent consideration it will be well to refer to the evidence given before a Committee of the House of Commons in the Session of 1875. A measure for additional facilities was introduced into that House, and referred to a select Committee. This Committee is remarkable for the length of time it sat, for the great variety of evidence it received, and for the patience with which it conducted its investigations ; and it is not a little noteworthy that it arrived at no real conclusion. We think it wisely aimed at none. We may even go further and say it could hardly have arrived at any. We may also venture to say that the Evidence was such as, offering no definite proposal, and confined to no tangible grievance, could hardly do otherwise than create bewilderment. All sorts of cases were sought out, and opinions of the wildest kind were propounded ; it was not so much the want of Church Provision, as a provision for satisfying their peculiar opinions, which was the object with many of the witnesses. If the Committee had, or could have, confined itself to the one question of Church Accommodation in connection with the Parochial System, and in aid of the intention of that System, some reasonable and advantageous plan might have been adopted. To go,

however, to our real point, we have to ask, what is our present position in respect of Church Wants on the ground already stated, and by what means can an effectual remedy be had? The ground is the complaint that sufficient facilities are not given for the provision desired: that it being patent to all, that the want or grievance exists, a proper liberty of action is not given to those by whom it is considered a grievance. Now, in the first place, it is true enough, as alleged, and as the very appointment of the Committee referred to testifies, that the Parochial System does require in very many instances a careful revision, with the view of adapting it better to its purposes, so far, that is, as relates to increased facilities for Church Ministrations, and next, that it is essential to lay down some specific rules by which this object is to be attained. We may begin with saying that it is impossible in every case, and it may be in the great majority of cases, to put all parties where the wants exist into the full original conditions; this has been done to a very great extent, but there are numberless instances where it cannot be done. Churches cannot be provided in all places; but that is no reason why that should not be done for which means do exist. It is obvious that our meaning points to the foundation of Districts and the Establishment of Ministrations wherever inhabitants are so situated as to be placed out of the fair reach of the Parochial Church and Minister: and that power should be given in any such case for the setting apart of a Building for the use of such district, and the appointment of a Minister. The Bill introduced in the last Session of Parliament meets this view of the case more adequately than any proposal we have yet seen: it proceeds upon a right principle; it does not seem to us to interfere improperly with any right; it simply says that where means of Religious Service do not exist by reason of distant or inconvenient situation, proper authority should assist in providing them. If the area of a Parish be so large, and the Population so scattered, that the one Minister cannot cover

the whole, surely the means offered for a remedy ought not to be disregarded. We cannot conceive any one objecting; if one man cannot do the work, how can he deny the claim of those to whom it is due, and to whom it is not given, to other means of provision? So, also, where the one Church is not sufficient for the whole, how can he refuse the offer of an additional Church, or of an additional Service under proper safeguards? A common right almost necessitates a common provision. We are now speaking of cases in which the assistance is proffered, so as to constitute no charge on the Benefice concerned; and we hope that we need not say that in any such case, no difficulty will be found. Wherever the Bishop, the Chief Minister of the Diocese, has such a proposal made to him, he should be authorized to consider and decide upon it: he should have the means of due inquiry, and where he sees that the want is real, and the means are at hand, he should be enabled to sanction the scheme, and take order for the due carrying of it into effect. This refers to voluntary doings only—voluntary provision without touching the Benefice. With respect to the part of the case we have just discussed, we do not apprehend the difficulty which usually arises from the idea of objectionable interference; the actual interests of no one are touched, and all that is done is to supply a deficiency or to correct a very perceptible grievance. Indeed, we have an example in point exhibited by the Ecclesiastical Commissioners. They, where they are interested as Possessors of Property, and the Benefices are not sufficient to the finding of Funds for the employment of Curates, and the work is too large for performance by the respective Incumbents, do provide Curates, and in no instance have the Incumbents refused the assistance; indeed, they have both sought and thankfully received it: thus, the principle is established, and no reason can be given against similar proposals, though in somewhat extended manner, where similar wants exist. The difference between them is simply this: that, in the

instance of aid given by the Ecclesiastical Commissioners, the Curate is not independent of the Incumbent, and may be employed in such way as the Incumbent shall direct, the Commissioners only stipulating that the additional duties shall be performed. In other cases, the addition is of a more independent character. An independent Cure is formed, whether by means of a district, or otherwise; whether by means of the erection of an additional Church, or of some temporary structure. And thus it will be seen that the advantage lies on the side of the Provision now advocated. And this circumstance calls to our mind the fitness, we would say, the necessity, if the work is to be effectually performed, of the full assignment of the Cure of Souls. We mean that the external should not be abstracted from the internal work; that is, that the Services of the additional Minister should not be confined within the walls of his Church or Chapel or otherwise provided Place for Public Worship. We know no separation or abstraction in the Cure of Souls; and we know that arrangement to be anomalous which confines the exercise of the ministerial office to the Public Service only. It has been very usual, and we have always wondered at the mistake, to characterize the Cure of Souls as not included in the Public Worship: that is to say, that the Ministers of what are called Chapels of Ease should be assumed as having no Cure of Souls. Public Worship, nay all Worship, is a Cure of Souls; all is intended as a means and an instrument of Spiritual Good. On this principle we insist that the Minister who performs the Public Service of his Office should have the full charge in the Cure. His Service cannot otherwise be effectual, and he stands forth to the world as an idler when he is not publicly engaged in duty. This, it will be at once admitted, should not be; and we shall be exonerated from any appearance of having in the discussion of this point, stepped needlessly out of our way, besides which it will help us in our further case.

As already intimated, the other part of the question is one of considerable delicacy, and, it may be, difficulty; but there seems to us no reason why a satisfactory settlement of it should not be hoped for. We have as high a respect as any for vested interests; we would by no means deal injuriously by them. Where, however, such interests are not immediate, that is, where to interfere with them would not damage existing parties in a personal manner, we at the same time think that the public good, or wants, or necessities, should be effectually considered. It will be readily understood that we now refer, not to the case of an Incumbent in possession, but of the Patron, the party with whom the nomination rests. We think the rights of Patrons may be carried somewhat too far; that they may be construed too largely. To get at the real point we must look back to the rise of Patronage, to its intention, and the obligation which accompanied its grant. A Benefice was formed, we need not enter into a disquisition how, inasmuch as the purpose of it will give us all the information which will be useful. It was formed for the service of those whom it comprised within its limits; we will suppose a Church thus formed, and thus endowed; and thus placed under one Ministerial arrangement. Is this to be taken to exclude future wants, future and enlarged objects within these limits? To suppose this, would be contrary to all sense and fairness. The endowment, a material provision, must be stretched, as it were, to meet the circumstances; that is, to speak in plain language, where the one Church and the one Minister are insufficient, it must be well inquired into whether the endowment is able to meet the additional requirement; if it is, the supposed right of the Patron must not be allowed to interfere, but he, as holding a public trust for the benefit of the Public, is bound to co-operate; he is bound, by every true principle of common sense and common justice, not to regard his own right in the matter to be one of personal advantage. It is very important for us to bear in

mind that in the origin of Ecclesiastical Patronage, no personal advantage was contemplated ; it was simply the right, or, as it would be better to call it, the duty, of the Patron to select a fit person for the Service of the Church. Sales or Assignments were not dreamed of. As time went on, Patrons began to see that they had in their hands what might be called a personal advantage ; and so Ecclesiastical Preferments became of personal use. Still it was long before they acquired a legal recognition ; it was long before Lawyers taught that they were Hereditaments : it was long before the Legislature caused settlements and arrangements regarding them to be recognized ; as, however, this has been done, we admit the legal right of obstruction to improvement ; but, what rightly thinking man can permit himself to be an obstacle to improvement, especially in a matter of so responsible and so sacred a character ? We may at least claim the assent and the co-operation of those who cannot claim a personal right, who cannot desire a personal advantage, we mean the Public or Official Patrons ; and we ought to presume that, when once persuaded of the necessity of any case, they will readily give it the full benefit which is sought ; and there will be this further advantage, from their acknowledgement, and conduct in it, that both the necessity and the advantage will be better felt and understood also by those who are called Private Patrons. A great step will then have been made in a right direction : in truth, this will be looked upon as the first step which ought to be made. We now come to the case of Parishes where the means of Religious Services are inadequate to the requirements, but where the means of providing for them are sufficient ; that is, where the Area or Population, or both, may not be met by the means properly disposed, while yet the funds are adequate to their provision. Here is undoubtedly a difficulty, and one of no ordinary importance ; not because the rule of justice cannot meet it, but because it is or may be construed to interfere with personal rights, or the rights of Patronage ;

and if we were obliged to take such a view of the subject, we should be stayed *in limine*. This difficulty arises from the circumstance that Patrons are in many instances disposed to take the money view of the question ; as it cannot be denied that, if we were to take a Benefice of the annual value of £1000 into the Market it would be considered of much greater worth than two of £500 each ; but that is proving the principle against which we would contend. Let it never pass out of our minds that the Patronage is a Trust ; a trust in which the interests of those for whom it is exercised should be the main consideration ; and if a division, under which that trust can be fulfilled, can be better made to serve their purpose, it ought to be acceded to. We well know that it is not undesirable that in Ecclesiastical arrangements Benefices should not all be of the same material value. We need not argue this point, it commends itself as a sound principle ; but it may be carried too far, and it ought not to stand in the way of a confessed want. The only difficulty here would lie with the Patron, and where he does consider his right of appointment as a trust, none, I apprehend, would be raised ; it would be simply showing him how his trust may be applied to the greatest profit—to a real profit—a more extensive and effectual spiritual ministration. To the Patron who regards his rights as not so much a Trust as a valuable property, we have little to say ; with him it is a speculation, and we should have no scruple in throwing him back upon the first meaning and intention of Patronage. To such an one we would say that, as this his extended right can be traced back to the permission of temporal laws, he is under their subjection, and must suffer himself to be dealt with as they shall direct ; and that he is bound to submit himself to the advantage of the Community. We might, if we pleased, strengthen this reasoning by the Acts of the Legislature during many years past. The Ecclesiastical Commissioners have been authorized, and are certainly exer-

cising the authority, to compel a Benefice, where they have adjudged the value of it to be able to bear a reduction, to pass over a portion of its income for the augmentation of another, even though utterly unconnected with it, and at some distance from it. Now, if a Benefice may be so mulcted, and its proceeds so applied, surely the principle is at once granted that a similar operation may be directed where the proceeds are to be applied to the wants of the particular Benefice. We may say that we do not altogether admit the principle of the method as now acted on; we do not think it by any means fair that individual Benefices should be under this arbitrary single Act. We desire the augmentation of all poor Benefices, and we would rather see it effected by a general tax (a very moderate one would suffice,) enabling all to be concerned in what would be so generally advantageous. But when Benefices are confessedly capable of division, and the division would be of advantage to themselves, let the division be made. We say this concerns Patrons only, and it does so. The interests of the existing Incumbents would be saved, though we must remark that, be the Area what it may, and however large and inconveniently situated the Population may be, from the moment of his entering upon the Benefice, the Incumbent is responsible to the fullest extent, and we may justly expect his co-operation so far as it can be given; neither have we any scruple in stating our expectation that it will be readily given. We will add, that there need be no delay in dealing with Benefices in Public Patronage; they cannot be deemed in any way as of personal interest, and ought, most of all, as bound to set a good example, to show that they acknowledge that their Patronage is really considered to be, as it indisputably is, for the public benefit. The Bill to which we have referred, brought into the House of Commons in the early part of the last Session, but not proceeded with, we believe, to a Second Reading, proposes to give power to the Bishop, under certain limitations, to license a Clergyman where

additional services are required, or where services are inadequately performed. This is, so far, a right course. It seems to us a step in furtherance of the Seventy-seventh Section (as, indeed, is partially acknowledged in the Bill itself,) of the Act 1 & 2 Vict. cap. 106, by which the Bishop is authorized to appoint an additional Curate. The proposal now before us that "where the accommodation provided by existing Churches, or other Consecrated or Licensed Buildings within the Parish is insufficient in amount for the requirement of the inhabitants of such Parish," and "where there is a House, or are Houses, containing more than one hundred inhabitants, distant more than one mile from any Church, or from any other Consecrated or Licensed Buildings in the Parish—when the Incumbent has refused to make sufficient provision for the performance of such offices and services of the Church as such Incumbent is authorized by Law to perform—the Bishop may grant a License in remedy thereof." To this, as a general rule, we do not object; we think it, with proper precautions, to be beneficial in itself, and likely to lead to further advantage. We do, however, object to the means by which the Bishop is directed to satisfy himself of the necessity of the case. As a preliminary, he is to be provided with a due knowledge, either of himself, or through the Archdeacon or a Churchwarden. This is quite right; he is to be assured of his ground before he ventures a step. Having satisfied himself that he is fittingly called into action he shall give six months' notice to the Incumbent of his intention, if good cause to the contrary be not shown, to grant a License as required; that is, either to meet a case of neglect, or the need of additional services, including in the latter the assignment of a district. The stipend, to be paid by the Incumbent, is according to the direction of the Section referred to in the Act of 1 & 2 Vict. All this the Bishop is empowered to do, subject to Appeal to the Archbishop, without further proofs, unless he shall think fit, or unless he

shall be requested in writing, by either the Incumbent, or the complaining party, to issue a Commission of Inquiry. Certain individuals are named as members of this Commission, such as the Archdeacon, or the Rural Dean, or certain other Incumbents, or certain Official Laymen. To all this array we object. We object to the removal of the responsibility of the Bishop, we object to such a mixture as is set forth and which can lead to little else than contradiction and conflict. It would, in our view, be far more proper and effectual, if the Bishop were empowered to call before him the Archdeacon or Churchwarden, whether complainants or not, and also to require the attendance of the Incumbent, the subject of complaint, and having the assistance of his Vicar-General, to decide upon the evidence, and the statements made to him, giving either party a right of appeal to the Archbishop, who should also summon the same parties, if required by either. This is the short and simple way in which we would settle the question. We dislike all Ecclesiastical Commissions, they are seldom or never satisfactory, and always prolonged, tiresome, and expensive. We know very well that they are in great measure favoured in order to remove responsibility from individuals—a bad principle of action; each member sheltering himself under another. This provision seems to us to be the objectionable point of the proposal, and we hope that before it is again submitted to Parliament, the alteration here suggested may be taken into consideration. There is yet an observation we would take the present opportunity of making, affecting not only this point, but other parts of our Ecclesiastical System. The Bill authorises the Bishop to license a “Clergyman.” This is too wide an expression; the phrase should contain the addition, “being in the Holy Order of the Priesthood.” The License is to be granted where the Incumbent is wilfully neglectful, where the Church is insufficient, or where the Area is so situated as to necessitate an additional Minister. In all these cases a

person is required who shall be able to perform all the offices of the Church, and such cannot be done by a Deacon; so that the position, without the condition we state, will be incompletely maintained. It is not without reason we so insist. Deacons ought not to have, as in many instances they do have, "Sole Charge," leaving certain wants to be supplied by any neighbouring clergyman who may be willing to give his assistance. This is wrong: it has always both surprised and pained us. We know that the Priest must have the Education of the Deacon, and that it is desirable his experience should be gained under an Incumbent where the work is not small; at the same time we think that, even in this case, the sole assistant ought to a very great extent to be a Priest; indeed, in all cases where the administration of one is insufficient the duties will be inadequately performed if the assistant be a Deacon only. Where, however, the District or Parish is too large, or too scattered, for the ability of the Incumbent, and a Curate is assigned for service accordingly, very reason demands that he should be a Priest. We offer this suggestion to the notice of the Ecclesiastical Commissioners; they are in the habit, and very properly, in large and extended Parishes where they have interests, of providing stipends for Curates, and they have, by that arrangement, done great service; let us take the liberty of recommending that all such assistance be given on the stipulation that the order of the Priesthood be possessed.

We must now draw to a conclusion. Our subject is a very important one: the welfare of the National Church and the Nation is deeply concerned in it. Sufficiency of means of Religious Worship and Instruction is the right of every one amongst us; sufficiency, we may say, without at all trespassing on the liberty of any, according to the doctrine and rule of the Church which the Nation calls its own. It is notorious that this has not been fully supplied; and our purpose has been to shew how it may be effected. A personal and individual sense of duty, acting on benevolent

minds has done much : but we cannot but be aware how much remains to be done ; and how every day of neglect increases the difficulty of doing it. We have pointed out a means by which much may be accomplished, and in quarters where the example cannot but be influential and the impulse effectual. Let Ecclesiastical Patrons and the Higher Clergy (higher we mean in emoluments, for in reality all are equal inasmuch as the same work and authority lies on all) only regard what are called their rights as a Trust. If they will but do this, the Facilities for Public Worship in England's Church will be worthy of England's place among the Nations.

C. J. BURTON.

IV.—THE CODIFICATION OF THE LAW ON BILLS OF EXCHANGE AND NEGOTIABLE SECURITIES IN EUROPE AND THE UNITED STATES.*

THE General Law of Germany respecting Bills of Exchange (*Allgemeine Deutsche Wechselordnung*) had its origin in the common conviction of its absolute necessity for the commercial and financial intercourse of Germany. As far back as the years 1835 and 1836, the question was mooted at the Zollverein Congresses, which were held at that period at Frankfort, Leipzig, and other cities of Germany to regulate a tariff of customs dues for all Germany. In the

* The substance of this article was read as a paper at the Bremen Conference of the Association for the Reform and Codification of the Law of Nations, September, 1876.

year 1836 the Government of Würtemberg took the first steps, and issued a minute, or *Promemoria*, addressed to the different States of Germany included in the Customs Union, inviting them to consider the important question of establishing a common commercial code and uniform rules in regard to the rights and liabilities of parties to Bills of Exchange. In the year 1838, Prussia, following the example of Würtemberg, made a further step in advance, and officially brought this question to the notice of the Governments of the different States of Germany. Between that date and the year 1847 a series of monographs appeared, the legal profession of Germany seriously occupying itself with this question. Finally, with marked astuteness, the Cabinet of Berlin issued an invitation to the other States of Germany to take part in a conference for the purpose of considering the pressing question of framing a uniform Law of Bills of Exchange and negotiable instruments. The delegates of the different Governments met the 9th December, 1847, at Leipzig, and held thirty-five meetings, at which the principal points of difference were settled and voted upon, and a report adopted.

The National Assembly of the Confederate States of Germany,* by a large majority, adopted, with but slight modifications, the report of the Leipzig Conference, and, on the 1st May, 1849, the law, as voted by this Assembly, came into operation; with this reservation, that it only took effect on receiving final sanction in those States of Germany which elected to publish the law, that is, adopted it into their system of legislation by a separate Act of the Executive. Nearly all the States elected to publish the law as voted by the National Assembly, with very slight alterations. Austria, by Letters Patent, dated 25th January, 1850, adopted this

* The following is a list of the States which attended:—Austria, Prussia, Bavaria, Saxony, Hanover, Würtemberg, Hohenzollern, the Duchies of Baden and Hesse, Electoral Hesse, Holstein, Lauenburg, Thuringia, Brunswick, Nassau, Mecklenburg-Schwerin, Oldenburg, Lübeck, Frankfort, Bremen, Hamburg.

law for all the Crown States of that Empire, including Hungary and its dependencies, (revoked at a later period by the Hungarian Chamber, 21st June, 1861, the principles of the General German Law being, however, retained with but minor modification).

The General Law of Germany on Bills of Exchange has also been adopted by Sweden, 23rd August, 1851; Finland, 29th March, 1858; the Cantons of Switzerland (*Concordats Entwurf*), and Servia, following the example of Austria. The independent action of each State in adopting the Law, as voted by the National Assembly at Frankfort, naturally resulted in divergencies, each legislature yielding in its turn to the view of jurists of its own country, and that of the judges of its own courts. To meet this difficulty the various States of Germany, at the suggestion of Prussia, and by common consent, deputed delegates to attend a Conference, this time held at Nuremberg. At this Conference a sub-committee was appointed, whose report was published and submitted to the National Assembly, which, on the 15th April, voted a resolution substantially adopting the report. A final report, made at a subsequent Conference held in Nuremberg, and adopted by the National Assembly on the 13th April, 1861, concluded the labours of those eminent Jurists to whom this important task had been entrusted by their respective Governments.

The practical usefulness of this Code has been proved during the many years of its application in regulating the dealings of Merchants and Traders in the various States of the great German, Scandinavian, and Austrian Kingdoms and Empires, peopled by races differing from each other in their traditions, language, and origin. Notwithstanding these differences one common law has by experience been found applicable to all alike. The vast importance of this Code of Bills of Exchange can hardly be over-estimated. It rules the dealings of 79½ millions of inhabitants, covering the

enormous area of 363,921 German square miles. With these facts before us, it can scarcely be a matter of surprise that a conviction should be gaining ground that the time has arrived for common action on the part of the other European States, to follow the example of Germany and establish a Common Code for Bills of Exchange throughout Europe, and possibly to include the United States of America. Whether such a plan, suggested by no mean authorities, Bluntschli, Borchardt, Savigny, and Story, is feasible or not, is the question now before us. To enable us to answer either for or against this proposition, it becomes necessary to survey the juridical ground, and map out the lines of demarcation which sever the Juridical Systems of the different countries from one another. Story,* in his admirable Commentaries on the Law of Bills of Exchange, and to which I refer, has given a lucid account of the historical development of the Law of Bills of Exchange from the date of their first introduction, in the year 1181, when, according to Nougier (*des Lettres de Change*, V., II.), the Jews, having been driven out of France, invented a mandate, or written order, for the purpose of transferring their funds from France to other countries, where they had sought shelter. The theory, however, that the Italians first introduced the use of Bills of Exchange into Southern France, appears to be the most reasonable; Raphael de Turri,† holding this view with, it appears, great weight of authority in his favour. But, whatever may have been the origin of Bills of Exchange, the ever expanding commerce of Europe soon availed itself of this mode of payment at distant places, and the obsolete "*de platea ad plateam*" mode of settling accounts, as it was termed, was displaced by the mandate of the debtor or

* Raphael de Turri, *Disp. I., Qa. 4, No. 19--38.*

† Joseph Story, *Commentaries on the Law of Bills of Exchange*, 1847. *Origin and Nature of Bills of Exchange*, pp. 16 and 27. Dr. F. A. Biener, *Wechselrechtliche Abhandlung*, Leipzig, 1857; *Uebersicht d. Geschichte d. Wechsels*, ss. 16 and 21.

remitter, payable at a given fair or market. In the year 1597 the Duke of Parma, Raniucio Farnese, keenly alive to the profits which attached to the negotiation of Bills of Exchange, transferred the Bourse or Bill Exchange Market to Piacenza from Besançon.

The rules relating to these instruments as established at Besançon were adopted by the merchants at Piacenza, and subsequently by the Genoese and other Italian traders. The importance of the transactions in those early days may be inferred from the numerous corporations called "*Campsores*" and "*Mercatores*," which were formed in almost every city of commercial importance in Italy. These Corporations enjoyed a wide-spread credit, and possessed judicial power. In fact, Italy at that period owed much of its commercial activity to these bodies. In the year 1407 the celebrated Bank of *San Giorgio* was established by the Genoese*, and now Genoa, Venice, Florence, and Milan vied with one another in offering banking facilities to the foreign trader. The French, with their habitual quickness, soon learnt to adopt what the Italians had originated. Only at a later period did the northern states of Europe, Germany, Holland, England, and the Scandinavian kingdoms, adopt Bills of Exchange as a means of settling commercial accounts with foreign countries. But whilst the different nations in their turn followed the example and profited by the teaching of the Italians, the requirements of each State, and likewise the prejudices so often produced by wrongly interpreted juridical principles, resulted in a variance both in the form and practice, as well as the principle of these instruments.

It has thus happened that the same instrument, created for like purposes, has assumed different aspects in Italy, France, England, and Germany; three great systems being ultimately evolved by the Jurists, the Legislators, and the Courts of Law of these various states.

* Serra, Storia dell antica Liguria T., III., pp. 78—74.

I. The French system, all but universally adopted by the Latin races, which owes its origin to Dupuis de la Serra (*L'art des lettres de change*), the well known "*Pactum de Cambiando*" (A.D. 1693), subsequently developed by Pothier in his *Traité du Contrat de Change*, A.D. 1763. Under this theory the Civil Law notion of an *Emptio Venditio* (assignment of a chose in action, of a debt) is abandoned, a special Contract of Bills of Exchange taking its place, the contract being perfected by delivery of the instrument to the holder. Pothier appears to have been keenly alive to the fact that the "*payable to order clause*" constituted one of the essential characteristics of a Bill of Exchange, hence he insisted upon the name of the endorsee being stated in the endorsement. It was in a great measure owing to the influence of the name of Pothier that the Jurists who drew up the *Code de Commerce* for the Code Napoléon embodied in it the theory of a special contract. Pardessus*, in his "*Contrat de Change*," defines a Bill of Exchange to be "a contract, by virtue of which one of the parties contracting agrees to pay to the other at a given place a certain sum of money he has received at the former place." A Bill of Exchange coupled with an endorsement, and perfected by delivery, constitutes the mode of fulfilment of the original contract between the parties. This definition, ingenious as it is, yet when closely examined, proves to be the *Emptio Venditio (pecuniæ)* theory of the Italian School, only dressed up in a different garb. A Bill of Exchange being considered to be an agreement, according to the French Law, requires for its perfection three parties: 1st, a Drawer; 2nd, a Drawee; and, 3rd, an Endorser. The transaction, in fact, partakes of the nature of *Cession de Créance*, the instrument itself, which must be to order, being the means by which an assignment of a debt is effected, the Contract, and the instrument of a Bill of Exchange, however, resting respectively on independent ground. Im-

* Pardessus, *Traité*, 1 p. 18, n. 15,

portant consequences flowed from the juridical principles adopted by the French jurist. Thus there arose a stricter adherence to the form of the wording of the contract, the non-negotiability of a Bill of Exchange, unless the instrument was made payable to order, and the transfer specially named in the endorsement ; likewise, the necessity of stating the consideration given (*valeur*) on the face of the Bill. In other words, the instrument purporting to be negotiable was hampered by the restrictions which belong to an ordinary assignment of a chose in action.

II. In the North of Europe, England, Flanders, Germany, notwithstanding the existence of a large trade and extended commercial intercourse, to which the Hanseatic league owed its existence, the employment of Bills of Exchange was hardly known until the 16th and 17th centuries. By slow degrees, the merchants of Nüremberg taking the lead, Bills of Exchange came into use ; the northern trader in the first instance adopting the Italian rule of law as his guide—the employment of an endorsement to effect transfer of the rights and interest in a Bill being quite unknown at that period. Tardily introduced, reluctantly adopted, the important juridical questions involved in the creation of a negotiable instrument were not even thought of at that time. It was not until the close of the 18th century that jurists turned their attention to the important question of the true juridical character of negotiable instruments. Attention once, however, having been aroused, monographs and treatises on this subject followed each other in quick succession. From the long list before me, I have selected a few to mark the progress made—and first, the great work of J. G. Heineccius, entitled “*Elementa Juris Cambialis*,” published in Amsterdam, A.D. 1742 ; followed by Püttmann’s treatise, “*Grundsätze des Wechselrechts*” (A.D. 1784), the treatises of J. G. Sieveking (A.D. 1799), of Mittermaier (A.D. 1821), of Eichhorn (A.D. 1823) succeeding those of the older authors.

Passing over this earlier period we arrive at the time when

Dr. Karl Einert published his treatise on the Law of Bills of Exchange. Denounced at first by many as frivolous, and severely criticised by Jurists of that period, the theory of Dr. Einert has, because of its intrinsic scientific value, been accepted alike by the jurist and legislator of the great German Empire, until, finally, it may be said to be the ruling notion governing the laws of Bills of Exchange in all the great countries of the north of Europe, peopled by eighty millions of inhabitants.

It hence becomes absolutely necessary to consider the theory of Dr. Einert. It has already been explained that the *Emptio Venditio* notion of the Italian school, developed into a theory of a "Special Bill of Exchange Contract" by Dupuis, and later on by Pothier, underlay the definition of a Bill of Exchange given by the Code de Commerce (Code Napoléon). The definition given by the French code, Dr. Einert asserts, is wholly erroneous, and in lieu of it he has laid down the following fundamental rules:—1. A Bill of Exchange (*Tratte*) and a Promissory Note (*domicilirte Eigenwechsel*) partake of the same characteristics, and are, juridically speaking, identical, for "it is quite the same whether I say, upon this bill or draft pay Titius, or upon this Bill I promise to pay Titius."* 2. The only difference between the two instruments consists in this, that the maker or drawer of a Bill of Exchange guarantees not only the payment, but also the acceptance, whilst the maker of a Promissory Note guarantees only payment. 3. It follows from this that the drawer is the *principal debtor*, the *acceptor surety*. A Bill of Exchange is thus, according to Einert, in its nature only an acknowledgment of a debt, a promise to pay, rendered, however, negotiable by adding the word "order." Once admit this theory, and the necessary sequel is that a Bill of Exchange to order partakes of the character of a Bill to

* Dr. Karl Einert, Wechselrecht, § 2, 3

Bearer (*au porteur*), and on this point Unger,* Kuntze,† and other modern writers generally concur. The usage of bankers of *in blanco* drawings, that is, the issues of drafts without funds in the drawee's hands, points to the creation of paper money, analagous to bank-notes, only with this difference, that the acceptor is the surety who guarantees payment.

This practice of creating a circulating medium by the drawer is what Einert lays so much stress upon, in support of the correctness of his theory.‡ In framing the general law of Bills of Exchange for Germany, it must be understood that those who framed the law have studiously avoided adopting any one theory; on the contrary, they have endeavoured to embody only matured and universally accepted juridical opinions and usages of merchants, in so far as they were found applicable to actually existing circumstances. Nevertheless, it was all but unavoidable that some leading principle should be acknowledged. According to the Prussian Draft Law, A.D. 1847 (S. 6), which formed the basis of the deliberations of the Leipzig Conference, a Bill of Exchange is a formal literal Act, extending to the instrument itself the character of a commercial paper money. The framers of this draft further embodied in a Bill of Exchange the special characteristic given to it by Einert, namely, that it was only a modified form of a promise to pay a given sum of money to a third person, in which the maker was the principal debtor, and all the other parties sureties. They further accepted the theory that a Bill of Exchange was, in fact, paper money, its transfer constituting a payment. As regards Bills of Exchange or drafts to Bearer, with a view of guarding against the creation of unauthorised Bankers' Notes, Sections 9 to 15 prohibit their issue, whilst blank endorsements are held to be legal. It may be a matter of

* Op. cit.

† Kuntze, *Inhaber. Papier*. p. 201.

‡ The accommodation acceptor was formerly held to be the principal debtor. Byles on Bills, p. 227.

surprise why the German jurists found it necessary to ignore the Code de Commerce in framing the German Law. The reason appears to have been, not because they differed in theory, but because in the case of many of the rules laid down by the Code de Commerce it was found that they were wholly inconsistent with the modern employment of Bills of Exchange. This divergence may be briefly summarised as follows:—

1. The Code de Commerce is silent on the “*pouvoir de négocier*.” Strange to say, this right was originally contained in the Ordonnance of A.D. 1763, S. 16, that is, the right of endorsing over a Bill of Exchange to a third party at another place.

2. The 110th Art. of the Code, namely, the “*remise d’un lieu sur un autre*,” that is, the necessity of drawing from one place upon another, though easily evaded by making the draft for account of a third person, was found to be inconvenient.*

3. The Code de Commerce, Arts. 115-117, respecting the providing for payment, the covering of a draft. The rule making this necessary involved the placing of a fund in advance by the drawer in the hands of the drawee. A moment’s reflection will suffice to prove that any restriction must necessarily be based upon a wrong conception, both of usage and of the principle of law, underlying the transaction.†

4. *Blank Endorsement*.—The Code de Commerce is silent on this point; only by a somewhat forced application of the 138th Art. have the Courts of Law of France endeavoured to remedy the shortcomings of the Code by importing a procuration, or mandate.

* Biener, Wechselrecht, p. 472, refers to Hardung, who maintains that the Law of Bills of Exchange for Germany is but the putting into practice the theory of Dr. Karl Einert, pp. 472 and 487.

† Biener, p. 488.

A Bill of Exchange, endorsed in blank, is thus rendered negotiable, but by means of a procuration only, with equities attaching. By the German Law, art. 36, the holder of a Bill of Exchange is exempt from the necessity of furnishing proof of identity of prior parties to a Bill, the Code de Commerce retaining the older opinion in this respect. By the Law of France, mere delivery does not transfer title, while the German Law allows this. Further, the value (*valeur*, *valuta*, consideration) must be stated, according to the French Law, on the face of the Bill; the German Law, on the contrary, expressly rids the holder of a Bill of Exchange from all liability of proof of value given. Another point of importance is that of cumulative re-exchanges and charges. The Code de Commerce allows only one charge for re-exchange; the German Law inflicts cumulative charges on antecedent parties.*

III. In England the introduction of Bills of Exchange is but of modern date. It is true, we may find traces of their employment in the 13th and 14th centuries.† Nevertheless, the year-books and reports of the 16th century do not contain a single reported case. Rymer's *Fœdera* refers to the use of exchanges and re-exchanges (A.D. 1554) by Sir Thomas Gresham, in remitting moneys to King Edward VI. and Queen Mary. Chitty‡ and Story§, in their historical sketches of the development of the use of Bills of Exchange, furnish an interesting account of the adoption of these instruments in the 15th and 16th centuries. The Acts of Parliament regulating the Law of Bills of Exchange§ gave but tardily legislative sanction to some of the usages and customs of merchants. The English Courts of Law, from

* Biener, p. 488.

† Madox, *History of the Exchequer*, ch. 28, p. 638 et seq.

‡ Chitty on Bills of Exchange.

§ Story, *Commentaries on the Law of Bills of Exchange*.

§ 9 & 10 William III., C. 17 (1699), 3 & 4 Anne, c. 9 (1705) (as regards Ireland), 1 & 2 Geo. IV. c. 78, 18 & 19 Vict. c. 67, and 19 & 20 Vict. c. 97.

the days of Lord Holt, tenaciously adhered to the theory of an assignment of a *chose in action*, and only reluctantly have our lawyers yielded to the more modern notion put in practice by merchants and formulated into legal axioms by Continental Jurists—namely, that of the unfettered negotiability of a Bill of Exchange.

The fundamental notion universally current in England being that a Bill of Exchange or Promissory Note transferred a debt (a *chose in action*), there arose a necessity of proof of a "*justa causa*" (consideration), the burden of which fell upon the holder. Both these rules greatly impaired the negotiability of the instrument and hindered the right of recovery, destroying its free use. To remedy these defects the Legislature intervened, and, to use Chitty's expressive words, "clothed the instrument with special privileges."*

The Courts of Equity, it is true, to remedy the evil extended an Equity in favour of the assignee, that is a right to sue the debtor in the name of the assignor.† The tardy and costly aid of a Court of Equity, however, ill suited the requirements of the trader and banker. By slow degrees the custom of merchants prevailed. Hesitatingly our Courts consented to acknowledge the Law Merchant, the Legislature in part consolidating what had been sanctioned by usage.‡

The numerous cases cited by Chitty, exceeding 2,000, embody the laws of England. These decisions have cleared the way for an ultimate consolidation into a system of the laws, rules, and practices in relation to these instruments. The absence of any guiding principle has, it is to be feared, made it all but impossible to shape the material contained in these decisions into anything approaching completeness. Nevertheless some general rules may be deduced, which might ultimately form the foundation of a system. As

* Chitty, *Treatise on Bills of Exchange*, 10th ed., 1859.

† *Coke on Littleton*, s. 847, p. 214. Formerly the King only could cede a right of action absolutely.

‡ *Bayley on Bills of Exchange*, 5th ed., 1830.

already pointed out, these rules in many respects conform to the German Law, and the acceptor being regarded as the principal debtor, all the other parties as sureties (Einert regarding the drawer as the principal debtor and all the other parties as sureties). In the United States of America the English Law prevails throughout the Northern States of the Union.* Chancellor Kent,† in his Commentaries, gives a lucid account of the difference between the Laws of the various States of the Union, remarking that, subject to local modifications, the rules of the English Law prevail.

The leading features of the Law of England regarding Bills of Exchange, according to Byles and Chitty, may be stated as follows:—First, That transfer by endorsement, or delivery assigns the sum stated on the instrument absolutely. Second, That in the absence of fraud, it is not necessary to prove consideration on the part of the holder. Third, That a Bill of Exchange passes by endorsement (without notice). Fourth, That an endorsement may be either special, general, in blank, or to Bearer. Fifth, That notice of dishonour, only and instead of protest, save in the case of foreign bills, is necessary. Sixth, That a Bill of Exchange or promissory note may be created by any written words expressing the intention of the parties, it being neither necessary to state the name of the place, nor the date, nor the time of payment; even the direction of payment to order need not be in any given form. Seventh, No words importing *value* or consideration are necessary. Eighth, Acceptance must be in writing, and in words plainly signifying an under-

* The Civil Code of the State of New York (Tit. xv. on negotiable instruments) enunciates the law as in force in the Northern States with admirable precision. Both the public and the profession are indeed deeply indebted to David D. Field and Alexander W. Bradford for the manner in which they have carried out their important task. Civil Code of New York, 1865, Report of Commissioners.

† Kent's Commentaries, v. iii. s. 71 (Negotiable paper).

‡ Chitty's Treatise on Bills of Exchange; Thomson, on the Law of Bills of Exchange; Byles, The Law of Bills of Exchange.

taking to pay. Ninth, That the acceptor is the principal debtor, the other parties sureties; each prior party being a principal in respect of each subsequent party.*

In the views expressed by Byles and Chitty, Dr. Story, with but unimportant modifications, concurs. Story lays down the rule that presumably the drawer has funds in the hands of the drawee; that he sells or assigns to the transferee for valuable consideration such part thereof as amounts to the sum stated to be payable by the Bill, and that acceptance is appropriation, *pro tanto*, of such funds; hence the acceptor is treated as the primary, or principal debtor to the payee, or other holder of the Bill of Exchange. Further, that the drawer and other parties on the Bill are held only to be collaterally liable. Chancellor Kent, following the language of Bayley in his Treatise on Bills of Exchange,† gives a definition which is at once concise, clear and accurate. "A Bill of Exchange," says this author, "is a written order or request by one person to another for the payment of money, absolutely and at all events."‡

IV. In respect of the laws of the Russian Empire regarding Bills of Exchange, and which constitute the fourth group of Laws respecting these instruments, it is only necessary for my present purpose to observe that they intrinsically resemble those of Germany. The rules and Laws relating to negotiable instruments are contained in the code of the Empire promulgated 23rd June, 1832,|| and further amended 15th December, 1862.

The Imperial Government has since published a draft of a Law (1869) embodying many important amendments. The matter is now under consideration. In amending the Law of Bills of Exchange, it is generally understood that the General Law of Germany is, so far as practicable, to serve as a guide. For the kingdom of Poland, the Code de Com-

* Byles on the Law of Bills of Exchange, p. 222.

† Bayley on Bills, Ch. I., p. 1.

‡ Kent's Comm. Lect. 44, p. 74.

|| Reichs Codex Russlands, Enthaltend die Wechselordnung, 1832.

merce (1807) is in force in its entirety. The Duchy of Finland has, as stated previously, adopted the German Law.

The laws of the different settlements of our Colonial Empire differ widely from one another. Thus, in Ceylon, and the Cape of Good Hope, the rules of the Roman-Dutch Law are retained; in the Colony of Mauritius, the Code de Commerce is in force; whilst, in Lower Canada, the Civil Code of France substantially prevails. In the Australian Colonies, Upper Canada, British Guiana, Trinidad, and in our East Indian possessions, the English Law prevails. In each of these colonies, however, it must be remarked that local laws have to a certain extent introduced modifications. Appeals from all these countries lying to the Privy Council, England is thus not only the commercial centre of all of these vast territories, but the seat of the ultimate Supreme Court of Appeal. Nevertheless, up to the present day, strange as it may appear, no attempt has been made to bring about a uniformity in the laws and practice regarding Bills of Exchange.

Having thus far endeavoured to explain the guiding principles in relation to Bills of Exchange and negotiable instruments which have been evolved from the usages and customs of the merchants of Northern Europe, the question may be, it is conceived, urged with great force, whether it would not be practicable to establish a common code for the continental States of Northern Europe, Germany, Austria, Scandinavia, Prussia, and England, as well as for the United States.* The answer, I believe, will be in the affirmative, each country preserving its own mode of legal recovery, that is without interference in the procedure of its Courts of Law. "The Jurisprudence which regulates Bills

* The first congress on trade (*Handelstag*), held at Heidelberg, 13th to 18th May, 1861, (*Goldschmidt*, p. 177), passed a series of resolutions to the effect that a Common Commercial Code for all the German States should be adopted; in part, at least, this suggestion has been already put into practice, the Commercial Codes of Germany and Austria substantially agreeing with one another.

of Exchange,"* to quote Story's concluding remarks on this subject, "can hardly be deemed to consist of the mere municipal regulations of any one country. It may, with far more propriety, be deemed to be founded upon, and to embody, the usages of Merchants in different commercial countries and the general principle *Ex æquo et bono* as to the rights, duties and obligations, of the parties, deducible from those usages, and from the principle of natural law applicable thereto." The usages and customs of the merchants of Northern Europe, to a certain extent, resemble each other; the same common sense and appreciation of what is useful in matters of trade exists in all these countries. It may hence be re-affirmed that their codification is a matter quite within the reach of the practical jurist and of the legislator.

H. D. JENCKEN.

THE NEW SCIENCE OF LAW.

PART II.

THE next important branch of the Science of Law is the limitation of legal phenomena, or the discovery of the line of demarcation between legal and social phenomena. This may be denominated the ascertainment of the province of Law. The province of Law has been discussed almost as profusely as the foundation of Law; and with results as indefinite in the former case as in the latter. If it be said that Law has to do with the property and lives of the members of the Community, there will arise diverse interpretations of the terms "lives" and "property." Religion and morality have to do with the lives and property of men. These by moulding the character influence, and by positive

* Story, *Bills of Exch.*, s. 20.

precepts direct, the conduct and lives of individuals and their use of their property. The moral and religious law declares "Thou shalt not steal;" likewise the municipal law. The moral and religious law declares "Thou shalt not kill;" and the same is true of the municipal law. It may be said that the moral law has exclusive dominion over the hearts and thoughts of men. But the municipal law has assumed to control the education of children and the worship of adults. The law often inquires into the intention of persons in committing certain acts. In cases of homicide, the intention governs the character of the offence and the penalty. In construing a contract the intention of the parties is to be ascertained, and extrinsic evidence will be admitted to throw light upon the intention if the parties have not so plainly expressed their minds that they will not be allowed to show that their intention was different from what appears in the contract. The law assumes to suppress vice, crime, immorality. It will not enforce a contract which is obviously contrary to good morals or public policy. It may be urged then that the moral law has exclusive dominion of the motives of men when not accompanied by the acts. But that is not strictly true. Even a threat or a slanderous word sometimes renders the person making it amenable to the law. One has the right in this country to enter his neighbour's house on invitation for the purpose of transacting any lawful business, or engaging in friendly intercourse. But if he enter his neighbour's house with the intention of feloniously taking his goods—if he is admitted in the usual way, but after his entrance, is prevented by the continuous presence of some members of the household from executing his design, and he quietly takes his departure, the law would hold him responsible if his purpose could be proved. Of course, the difficulty in such cases is in proving the intent. But I doubt not that the law could properly punish a felonious or immoral intent, in some cases, if there could be any reliable evidence of it, without accompanying words or deeds.

Again the law is not to be distinguished from morality, as many distinguish it,* in respect to the principle of its operation. The statement is often made that a thing may be legally right and morally wrong, and the reverse. Now, in the beginning of all legal systems, in the rudimentary stages of all society, the moral and municipal law were both administered by the same tribunal, and adjudged by the same authority. The same principles were applied in the decision of all classes of questions, and there was no division into legal and non-legal questions or principles of adjudication. This union of the so-called moral and legal modes and principles may be seen in the Pentateuch, the Talmud, the Institutes of Menu, and the methods of applying them to the affairs of men. Originally the priests were the judges; gradually the affairs of life became so extensive and complicated, and so numerous became the cases for judicial interference that a person or class of persons were set apart for the special purpose of settling disputes among men and for enforcing penalties. Hence arose the judicial class in contradistinction to the priestly class. But law did not then cease to be moral. The State has always professed to be the friend of religion and morality, and has always upheld both religion and morality whenever it has had the opportunity. The principle of deciding questions in court has always been the same as the principles applied in the church and in the conscience. The judge declares the *right* as truly as the priest or the conscience. In the division of functions which occurred on the separation of the priesthood from the judiciary, certain classes of questions were referred to the courts, and certain classes to the church for decision, while a large class of questions were retained—as was the case before the division of functions—by the conscience. Little by little these separate tribunals became distinct, and

* Amos, Science of Law, Chap., III., pp., 29-31.

each acquired its own rules, and settled its own jurisdiction. Conflict after conflict has gone on among these tribunals as to their appropriate jurisdiction. An adequate review of the development of the jurisdiction of the courts, the church, and the individual conscience, would carry me beyond the proper limits of this article. Suffice it to say that the body of rules arising in these separate tribunals has been denominated respectively law, religion and morality; and that is the principal distinction between them. The moral law is concerned more largely with psychical conditions than is the municipal law; and municipal law is concerned more largely with physical conditions than is the moral law. The moral law is enforced more largely by psychical power than is the municipal law; and the municipal law is enforced more largely by physical power than is the moral law.

It is true that after a system of jurisprudence has reached a considerable degree of perfection, there may seem a wide difference between the application of its rules to certain cases, and the application of moral rules. This arises from the establishment of precedents and general rules which cannot be deviated from to meet all special cases. In this respect, however, the municipal law is not inferior to ecclesiastical law. Although both assume to be based on principles which are, to say the least, not immoral, yet after long periods have elapsed and a body of decisions, precedents, and rules have arisen, neither the courts nor the churches feel themselves at liberty to depart from the general and uniform rules to meet extraordinary and peculiar cases. And there are those who affirm that it is morally wrong to erect public buildings, magnificent and costly, while there are thousands in the State who are poor and helpless, and living in want in dirty hovels. And so there are those who affirm that it is morally wrong for a church to build temples for worship, massive and expensive, while there are the same poor and helpless people living in the community. There are those who assert that the law is morally

wrong because a just debt cannot be collected after the statute of limitations has run against it ; just as there are those who assert that the church is morally wrong in not administering her rites to all persons without exacting the performance of precedent conditions. But the moral law itself has its general rules ; and the conscience has established precedents which the individual regards as binding upon himself. And there are those who affirm that morality is subserved by refusing charity to vagrants, claiming that charitable dispensations tend to increase vagrancy, and that such persons are better off in the workhouse. A dozen cases occur in the life of the individual, to one in the State and the Church, where general rules dominate over special rules.

In order to meet special cases, or cases where the existing law has been deemed inadequate, courts of equity in contradistinction to courts of law have been established in some countries. But the difference between "law and equity" is one of form and not of substance, of procedure and not of right. No principle of equity would allow any rule, absolutely contradictory to the rule of law, to be applied. The only purpose which a court of equity can serve is to furnish a remedy which a court of law does not furnish. The distinction between law and equity is not a substantial or tenable one, and should be effaced from our jurisprudence. Law in its largest sense is equity ; and equity is no more than law. Equity courts are simply media for the creation of new rules of law. In these views I am sustained by Lord Moncreiff, in his address before the Social Science Association, at Glasgow, September 30th, 1874. He says "There is no distinction between law and equity in any philosophical acceptation of these terms, for equity is the basis of law. Law, divorced from equity, is a monster which could have no place in any system of jurisprudence. But the truth is that in England the distinction is not truly expressed by the nomenclature. It is not one between the subject-matter or

the objects of jurisprudence, but one solely of courts and jurisdiction; not what the right is or what the remedy should be, but solely from what tribunal redress can be given. It never could have arisen save from the jealousies of co-ordinate courts, and the distinction can only be arrived at by confining the terms within arbitrary rules which deprive them of their primary meaning. * * * *

The enlightened legislation of the last year—to be completed, I hope, next year—terminates the reign of this anomaly, as far as theory goes; but there has sprung up around each of those divisions so strong a growth of distinctive principles and formularies in the course of centuries of able administration, that it will take many years before the rival camps will effectually unite. Probably they never will until their mutual technicalities are merged in a code."

Lord Moncreiff refers in the last part of the passage above quoted to the Judicature Act which united the courts of law and equity. The same thing has been done in many of the United States. The New York Code formally abolishes the distinction between law and equity.

From what has been said already in regard to the limitation of legal phenomena and the powers of tribunals, it will be seen that the province of law is exceedingly extensive. But something remains to be discussed in regard to the quality of the phenomena, or the character of the control of the State over society. In this connection I shall only consider how far the functions of government are positive and how far negative. If two persons make a contract which is valid, the State will see that it is enforced. If a person lives in a populous town, he may be prevented from building his house of wood or other combustible material, the safety of the surrounding property being secured by the erection of stone, brick, or iron buildings. If he carries on business, the law will prevent him from conducting a business which is a nuisance to the community. In fact, if one does anything the law may place some restraint upon his mode of doing it.

The principal function of government is negative. It is negatively regulative. Herbert Spencer divides the functions of government into two classes: positively-regulative and negatively regulative, the latter being the principal. He considers that "all that is needful for the normal performance of the internal social functions is, that the restraining or inhibitory structures shall continue in action; these activities of individuals, corporate bodies and classes, must be carried on in such ways as not to transgress certain conditions necessitated by the simultaneous carrying on of other activities. So long as order is maintained, and the fulfilment of contracts is everywhere enforced; so long as there is secured to each citizen, and each combination of citizens, the full return agreed upon for work done, or commodities produced; and so long as each may enjoy what he obtains by labour, without trenching on his neighbour's like ability to enjoy, these functions will go on healthfully—more healthfully, indeed, than when regulated in any other way."* The State should not demand that the citizen should do *this* or do *that*; that he should build a house; make a contract; marry a wife; unite with the church; engage in business. But if a person concludes to marry, the State will prescribe the conditions. The State has always regarded marriages as within its peculiar province. By the Rules of Ulpian (title xiii.) it appears that "*lege Julia prohibentur uxores ducere senatores quidem, liberique eorum, libertinas et quæ ipsæ quarumne pater matris artem ludicram fecerit; iidem et ceteri autem ingenui prohibentur uxorem ducere palam corpore quæstum facientem et lenam, et a lenone manumissam, et in adulterio deprehensam, et judicio publico damnatam, et quæ artem ludicram fecerit: adicit Mauricianum senatus consultum a senatu damnatam.*" By the commentaries of Gaius it appears that "*sciendum autem est non omnes nobis uxores ducere licere; nam*

* Spencer, *Essay on Specialized Administration*. See also, *Social Statics*, ch. XXI.

quarundam nuptiis abstinere debemus." "Sane inter fratrem et sororem prohibitæ sunt nuptiæ, sive eodem patre eademque matre nati fuerint sive alterutro eorum." "Fratris filiam uxorem ducere licet: idque priorum in usum venit, cum divus Claudius Agrippinam, fratris sui filiam, uxorem duxisset."* And the Incas of Peru married their own sisters under the law. Restraint of the disposition of property by will has always been considered a proper function of the State. By the Rules of Ulpian (xxiv. 17) it appears that "pœnæ causa legari non potest, pœnæ autem causa legatur, quod coercendi heredis causa relinquitur, ut faciat quid aut non faciat, non ut ad legatarium pertineat ut puta hoc modo; si filiam tuam in matrimonium Titio collocaveris, decem milia Seio dato."

The State may very properly interfere in such important matters as marriage and disposition by will. It may, perhaps, construct public highways, canals, railroads: it may furnish public media of communication, such as the post-office or the telegraph; but these affairs should not be actively engaged in by the State unless private enterprise will not bring about the desired results. And it is not at all certain but that private enterprise would effectuate these matters quite as soon as the community requires them. At least, wherever internal improvements, industrial institutions, education, science, art, will flourish without the positive interference and assistance of the State, the State ought not to intervene. The prime object of government is to *protect* the members of the community and not to assist them; to maintain order, and not to dictate what that order shall be.

It is this negatively regulative principle which keeps governments and courts from having more than they can do. When the functions of the State cease to be negatively-regulative and interfere largely and positively in, the

* Gaius, Comm., Lib. I, 58, 61, 62.

affairs of the citizen, when law becomes in fact anything more than a condition of social evolution, then confusion and disorder ensue. So long as government keeps in its proper place, there is sufficient moral force in the community to enforce the laws in a vast majority of instances. Thus all social intercourse, when left to self-regulation, needs no tribunal but public opinion. The greater part of the affairs of life when only negatively regulated by law, are conducted in accordance with the true law; and recourse to the municipal tribunals, although not infrequent in the absolute, is comparatively rare. The ideal legal period would be when courts and governments were no longer needed.—when every citizen knew the right and did it.

Thus far in the discussion I have not brought out prominently the distinction between the written or positive law and the unwritten or unadjudged law. I shall now proceed to consider the transformation of the unwritten law, which I call the true law, into positive enactments and judicial decrees. Since the true law is a condition of the existence and development of society, the effort of the law-giver and the judge should be to make the positive and adjudged law the exact symbol and representative of the legal conditions of society. If the written and adjudged law do not interpret in true terms the legal phenomena of society, or do not correspond with the demands of society, either the law will not be obeyed and enforced, or society will be forced into a position antagonistic to itself, and will be developed in a direction contrary to its tendencies. In surveying the field of history one is impressed with the feeling that much of the written and adjudged law of mankind has undoubtedly been of the latter character; so that the world has witnessed, on the one hand, constant scenes of violation of law, and on the other hand, constant efforts of the law-giver and the judge to retard, modify, or accelerate the true progress of the subject. In all times, the painful spectacle has been pre-

sented of the legislator and the judge imposing their own laws upon society. In the effort to conform social progress to their standard, they have sometimes precipitated the horrors of revolution and anarchy. It is not contended that all citizens would be law-abiding if the positive law was the complete representative of the unwritten law, or if the true law was applied to their lives and affairs. Nor is it contended that life would become uninterruptedly peaceful and prosperous if legislators and judges were always wise and honest. Such a condition of things could only exist at a more advanced stage of civilization than any people has yet reached. It would be only possible in that ideal period, when the true law of social development would be intuitively perceived by all and obeyed by all. That might be denominated the self-administrative period. But I doubt not that some infractions of law, some irregularities and anomalies, are just as essential in the progress of society as the regularities and uniformities. The existence of a large number of individuals in society, who are either too ignorant or too stupid to perceive their true relations to their fellows, or who are too selfish and impulsive to conform to those relations when known, leads to the necessity for the transformation of the unwritten law into statutes and adjudications, and to the prescription of penalties for violations. In the progress of society and, indeed, simultaneously with the appearance of the simplest social structure, there arises a governmental organ, a vehicle for the expression and enforcement of law. In the ruder forms of society, the governmental function resides in the head of the family, of the tribe, of the community, or of whatever organization is unified from local elements. This is the patriarchal period. In a more advanced period of social development, the governmental function resides in a single head, with accessories under the control of the head. This is the period of monarchical government. Sometimes the governmental functions reside in a number of persons or departments.

This is the aristocratic or limited period of government. As intelligence becomes diffused, industrial institutions increase, and wealth is distributed, larger numbers participate in the affairs of government, and a definite expression of fundamental law is procured. This is the period of constitutional government. A further advance in social progress is accompanied with a further distribution of governmental functions, until we reach a republican form of government, which is a government by representatives of the people. All of these forms of governments may exist, and have existed at the same time, since different societies arrive at a given state of development at different periods. A pure democracy existed in Athens, a republic at Rome, absolute monarchies in Asia, limited monarchies in Africa, and patriarchal governments in some parts of Europe, Asia and Africa, synchronously.

There are three phases of the transformation of law: the legislative, the executive and the judicial phase. These phases of transformation are represented in the corresponding departments or functions of government, the legislature, the executive, and the courts. It is the legislative function to translate law into statutory form. It is the judicial function to interpret and apply law. It is the executive function to execute the law. The legislature converts law into general form, the courts convert law into special forms, the governor converts law into practical forms. Governments early begin the translation of law into general forms by the enactment of a code, containing a few of the general laws. This code is sometimes framed by a personage who combines in himself all the functions of law-maker or legislator, judge, and administrator. In such cases, there is no distinction to be made between politics and jurisprudence. In the progress of the development of governments, as we have seen, the jurisprudential and juridical functions are separated from the political and organic functions, and a body of men is devoted to declaring and applying the law. This rise of a judicial body, and the corresponding rise of tribunals of justice, in

which both the written and the unwritten law are administered, render possible systems of jurisprudence.

Anterior to the establishment of distinct tribunals of justice, the positive law is of the most uncertain and fragmentary character. But with the establishment of courts commences a series of decisions which is organized into a system of jurisprudence. After a body of rules has been formed the method of deciding causes in courts becomes complex, intricate and artificial, so that whereas the judge formerly decided causes in a simple, arbitrary manner, upon his own view of the rights of the parties before him, he now decides according to precedent or authority. In the early stages of a system of jurisprudence the judge is as much a legislator as he is an interpreter. For, although there may be a code for his guidance, yet that code is necessarily imperfect and general, and does not include new cases which are constantly arising, and constantly demanding special laws for their decision. But in the course of judicial progress the judge is transformed from the quasi-legislator to the strict interpreter; and his function is to apply the statute law and the precedents to the cases which come before him. Jurisprudence is then a science of precedents, technicalities, and fictions, settled principles and inferential analogies. It is wholly artificial in its character. *Res adjudicata* is the maxim of all the courts in the decision of like causes; and unless some entirely new case arises, some state of facts without analogous precedent, something altogether unlike any thing found in the "books," the judge feels bound to decide according to the "authorities" or the decided cases. Now in the course of this artificial development of juridical law, it may be that the adjudged law falls behind the true law—it may be that it fails to represent and symbolize the real legal phenomena of society. This is not an impossibility even from an *a priori* view; and observation shows that it is not unfrequently the case. We have a completely artificial system of symbols for a complex, varied, and multitudinous

class of phenomena. If these symbols are not frequently compared with the originals, especially where the originals are liable to great change, if the symbols are not modified to correspond with the originals, then the symbols become defective and anachronous. If, after the lapse of years, it is found that society has advanced beyond the rules laid down by the earlier authorities, which rules the later courts are still applying to the later order of things, then there occurs a discrepancy between the adjudged law and the true law. And if the courts are powerless to assimilate the positive and the unwritten law then there is no remedy for society but by the interference of a distinct function, the legislative function, to correct and modify the results of the adjudications, and to conform the written to the unwritten law. The tendency of great judicial systems is to remain stationary, to avoid change, to stand by authority, to resist progress, and neither to note nor recognize the transitions in society. Jurisprudence as it exists to-day is essentially Conservative, and often behind the times. In its Conservative aspect it operates as a check upon excesses. Still if it gets too far behind social progress in the aggregate, as it is prone to do society is injured and Jurisprudence falls into disrepute or impotency. Lord Moncreiff, in the address from which I have already quoted, says: "For those who administer the law it is immutable. That which has been is that which shall be, and should be. The perfection of the science—which never can be perfect until mankind is so, and then it might be dispensed with—is that its precepts should continue as they have been, and the judge is condemned if the ancient landmarks are removed. When new occasions arise the old occasions must be invoked to solve them, and the old maxims and the old formularies must be sought for at the fountain head. But while law in its own eyes is immutable, time, the devourer of all things, even of law, changes the objects for which law alone exists, silently abrading surfaces, effacing features,

raising land here, submerging it there, until the end and purpose which the law was made to serve has disappeared altogether, or is so altered in its incidents and its surroundings as, perhaps, to invert the effect of its provisions. This is a process in constant and daily operation, and one which the administration of the law is powerless to prevent or provide for. It is hard to learn the law as it is without being obliged to look beyond its confines, and to note how far it squares with the times. So an aggrieved community wait until the current of legislation sets toward the future and, taking warning by the past, provides for increased equity and security."

The inability of systems of jurisprudence, as they are now constituted, to modify themselves to suit the real wants of the age and community, renders frequent applications to the legislative department necessary. Hence large numbers of statutes are annually enacted in constitutional and progressive governments; and in some countries the whole law is codified. Partial or complete codification is essential to the adaptation of jurisprudence to society. How far or how complete codification should be made depends upon the circumstances of the time and social and political considerations. It depends upon the condition of the system of jurisprudence considered as a whole, and considered in its relation to society. And just here comes into prominence the superiority of a science of law which comprehends jurisprudence, political economy and history. Jurisprudence is but a single department of legal science, the department of translation or interpretation. But the complete science of law, by investigating legal phenomena, not only independently, but relatively, affords superior facilities for the translation of law into symbols, and for comparing the symbols of the adjudged law with the true law, the social conditions which they represent. A legislator, who is a true legal scientist, has superior qualifications for codifying the law, over the mere judge or lawyer. And it would seem that in most

cases codification would be preferable to adjudication. The history of law shows that codification dates back to the earliest times—back to the very verge of the pre-historic period; that all people as soon as they have had a literature, have had also a code, more or less extensive and corresponding more or less nearly with the social environment. A large part of the history of the race is found written in its Codes—its “Ten Commandments,” its “Twelve Tables.” The Athenians and Spartans had their Codes—the Codes of Solon, Draco, Lycurgus. The Romans had an extensive Code, that of Justinian, which is the foundation of all the Codes of Western Europe. The northern nations of Europe and the Asiatics have had codes partial or complete. There are also many codes in America. In England, codification has not been popular for several hundred years, although much of the English law is adapted from the Civil or Roman law. But statute after statute has been passed, decision after decision has been rendered—the statutes to supplement and modify the decisions, and the decisions to interpret the statutes and the unwritten law, until the positive law of England is a perfect labyrinth. In recommending codification it is not to be inferred that there are no difficulties in the way. To represent, in exact terms of language, the legal phenomena of society requires an amount of industry, comparison and investigation which is incomprehensible to the uninitiated. If a Code Commission were to attempt to frame an entirely new code for a highly civilized people without any of the materials which jurisprudence and statutory enactments afford, the task would be well-nigh impossible, and the result would be, at best, wholly inadequate. It would be like constructing a new language for a people. Codes, like languages, are the creations of a vast number and variety of forces operating through a long period of time. But the difficulty of framing a good code is lessened by pursuing the historical method, and by taking antecedent or existing codes, statutes, decisions and treatises, and comparing

these with each other, and with what is believed to be the true law, making changes here and there, and organizing the whole into a system. Codification, it is true, will not do away with all disagreements of co-ordinate courts, nor prevent and abolish all litigation or prosecutions. So long as the words of a language separately and collectively are susceptible of different renderings and applications, so long will judges disagree as to the meaning of the provisions of codes. The best code that can be made will possess defects, uncertainties, and inadequacies. We shall have litigation and prosecutions still. But the inquiry presenting itself to the law reformer and the legal scientist is not how shall all litigation, prosecutions and judicial disagreements be stopped, nor how shall crime be entirely suppressed and punished, nor how shall suitors get justice without any trouble or expense? but how shall these litigations, prosecutions, judicial disagreements, troubles and expenses be reduced to the minimum—how shall the difference between the written and the unwritten law be diminished, and the total social requirements be met? It is believed that codification is the chief way to accomplish this purpose. Piecemeal legislation may do something towards this; but complete codification is essential to the accomplishment of complete results, and is essential to unity. In governments having a written constitution there should be in addition to this constitution, a political, civil, and criminal code, consisting of declarations of the executive, judicial and legislative functions, rules of substantive law, procedure and administration. Codes need occasional modifications, in order to conform to the progressive changes of society. In this respect, the object is to make the change correspond with the social changes, both in time and amount. Wherever the system of codification is thoroughly established, the modifications are wrought by the influences of society with sufficient rapidity.

The same principles which govern in the transformation

of the unwritten municipal law into positive law, are applicable in the transformation of the unwritten private international law into positive law. A code of private international law would be beneficial in securing uniformity of regulations to the citizens of different nations. A complete code of this law with a court to administer it has been established by the Khedive of Egypt. Tribunals for the administration of the unwritten law have been established in Europe, and a tribunal of this character has been recommended by the President of the United States for that country. The prospects of a complete codification of private international law, which the principal commercial nations will recognize, are not such as to warrant the opinion of its immediate execution.

In respect to the codification of public international law some difficulties arise which are not found in private international law or in national law. In the latter cases the code can be enforced by competent governmental authority; in the former case a code cannot be so enforced. There is no physical authority residing in any governmental organization which is above and superior to the respective nations. It is true that there has been for ages a species of law existing among nations called the *Jus Gentium*, but this is now understood to have meant in early times simply the laws which are common to all nations, and not to have referred to the rules governing the intercourse of nations as such. There has also been a true public international law, but this has only been expressed in positive form by occasional treaties, and decrees of arbitrators. Public international law is, comparatively speaking, in its infancy. The legal scientist, in order to discover the true public international law, must refer principally to what may be called international sentiment. Although that would not be the sole test. No system of rules, however reasonable or ideally perfect, or apparently useful, will express the true international law if it does not express the international sentiment, which is a compound of international reason, will, emotion, and

notion of utility. But even that may not be the true law; for there are certain forces at work in the environment, physical, commercial, military, industrial, certain antipathies and diversities of sentiment, which render the true and real public international law not representable even in terms of sentiment. The present state of international relations does not seem to admit of a very complete or specific code. All that can be accomplished is the partial codification of public international law—including only such points as give rise to the least differences among the nations—and the establishment of a court of arbitration to interpret and apply the code. This code should be at present nothing more than an enlarged treaty among as great a number of powers as can be induced to enter into it. This would, of course, require official instead of private action. The official mode of preparing the code seems to be preferable to the unofficial mode, inasmuch as in any event the final sanction of the code would have to proceed from the governments interested. It is true that publicists may do much in awakening the interest of the people and the governments in the matter of codification and arbitration. Eminent jurists, such as Bluntschli and Field, have done much in this way. Private persons may collectively discuss or compile a code, as the private international congresses in Europe have proposed to do. This may assist an official congress in arriving at a better knowledge of the real public international law. It is a mistake to suppose that the adoption of a code of public international law, or the establishment of a court of arbitration, or both, would have the effect of a complete suppression of warfare among the nations concerned. Even treaties are sometimes broken, and decrees of courts of arbitration would not always be obeyed. In the present state of international society, wars cannot be anything more than diminished—they cannot be abolished. Nevertheless, codification and arbitration are the necessary organs for the expression of the legal conditions of international society.

It is not designed to extend this outline of the science of law, in the present article. The new science of law will render the abstract theories of legal right, of contract, ownership and punishment for crimes of little more than historical value. It is well enough, perhaps, in a period when large numbers of facts cannot be obtained to depend upon pure reason for theories of causation and creation, of existence and relation. But this will not suffice after an extended and more complete knowledge of phenomena has been rendered possible by the methods of science. It has been the design of this article to indicate the scientific method in law. It has not been expedient to attempt anything more than a general and rapid survey of the field, over which the careful student of legal science must go with a slower tread and more minute observation.

The future legologist must be prepared to depart from the beaten paths of his predecessors and enter the broad and almost undiscovered region of sociology. He must be versed in both physical and psychical science, in political economy, history and jurisprudence. These are the attainments necessary to success in the new science. The mental and moral qualifications will, no doubt, be present—the qualifications of patience, perseverance, a large faculty of generalization, and a mind quite unbiased, although perfectly familiar with pre-existing notions. The successful inauguration of a new science of law would be a difficult, magnificent, and important achievement. But nothing is so essential as a correct and adequate legal science, to the formation of excellent codes and tribunals of justice. Not until we have a more perfect science of law, a grander legology, can the law-giver invent an instrument of codification which, like an instrument for indicating the temperature, quality, and depth of the waters of the ocean, shall be dropped down into the ocean of humanity and there silently and surely register the wants, wishes and conditions of men in the forms of law.

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VI.—THE PUBLIC RIGHT OF NAVIGATION.

FEW rights have been the subject of more constant litigation than the public, or, as it is sometimes called, the common law right of navigation. The aid of the Courts has been invoked, at one time to settle disputes between individual members of that vague entity called "the public" respecting the use of this right, which requires the rare quality of reasonableness to guide its exercise; at another time to reconcile the exercise of the right of navigation, using that phrase in its literal sense, by the navigating portion of the public, with the quiet enjoyment of the right of fishing by the fishing part of the public; at another time, to protect the public in the possession of their right from the encroachments of their proper protector, the Crown; and yet again, to prevent either the public right of navigation, or the private rights of riparian proprietors, being so used as to deprive the former of its fair and legitimate value, and the latter of their existence. But, although litigation has been plentiful, and the circumstances of the cases brought before the Courts infinitely varied, it is not easy to extract from the authorities any statement expressing with sufficient minuteness, on the one hand, or comprehensiveness on the other, what is the public right of navigation. The reason of this is probably to be found in the nature of the right in question. It does not readily yield itself to definition, being, in fact, not one right, but a collective name for several rights, distinct at least in point of user. "The sum of the rights of individuals forming part of the public, put together, makes the public right."*

The public right of navigation, although the most important, is only one of the rights that may exist in and over a

* Per Willes in *Kearns v. The Cordwainers' Co.*, 6 C.B. (N.S.), 388.

navigable river. There are other rights, both public and private, and it is very necessary to distinguish clearly between those that are public, and those that are private.

No single individual has an absolute right to exercise any of the rights, forming in the aggregate the public right of navigation. The right of each individual is carved out of the public or common right, but the several rights so carved out, are not, like the various rights which can be possessed by different persons over a subject of private property, mutually exclusive. The exercise of any portion of the public right by one person does not, even for a moment, suspend the possession by all other persons of exactly the same right, although it does of course hinder, for the time being those other persons from exercising their right. Thus, the problem in each case is to regulate the exercise of a right, which is admittedly possessed by all, but for the enjoyment of which a temporarily exclusive exercise is necessary, so as to confer, as far as may be, an equal benefit on all the persons possessing the right.

It is plain that the solution of that problem must vary according to the circumstances of each case. Perhaps only one person may wish to exercise the right in question, and in such a case he could do so unrestrictedly. But if several persons seek to exercise public rights which cannot be exercised in the same place, or at the same time, without clashing, then the Courts apply the rule that each person has equal right to a reasonable use. The public right, in fact, is neither more nor less than what a jury consider reasonable, having regard to all the circumstances of the particular occasion, convenience, or necessity in question, and to the relative benefit obtainable by the persons seeking to exercise the inconsistent rights, as well as to the ordinary character of the rights sought to be exercised, or to those considerations of public benefit which, while they required the creation of the rights, determine likewise the extent and conditions of their user.

But very different questions arise when there is a conflict between a public and a private right. These are mutually exclusive. The principles of give and take, of reasonable user cannot be applied to smooth over their inconsistencies. The owner of a private right is entitled to its full and exclusive enjoyment in what manner he pleases, always keeping within the maxim *Sic utere tuo ut alienum non ladas*. He cannot be compelled to share his right to a reasonable, or to any, extent with the public. If he were compelled to do so, his right would not be private. It is true that the public right of navigation overrides and qualifies all other rights inconsistent with its reasonable exercise; and, therefore, no private right can possibly exist within the limits of the definition of that public right. But the public right of navigation does not cover all the benefit that can be obtained from a navigable river. After the requirements of the public right are satisfied, there still remain valuable rights that are the subject of private property. And when private rights on a navigable river are spoken of, those rights are meant which are beyond the limits of the definition of the public right of navigation, and which do not therefore depend for their existence and exercise upon considerations of their effect upon the exercise of that right.

The ownership of the soil or bed of navigable rivers is vested in the Crown. But this ownership is subject to the public right of navigation, and to the private rights possessed by riparian proprietors, such as the right of access to and from their property on the river.* “The bed of all navigable rivers, where the tide flows and reflows,” says Lord Westbury in *Gann v. The Free Fishers of Whitstable*,† “is by law vested in the Crown; but this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm.”

* *Lyon v. The Fishmongers' Co.* in the House of Lords, not yet reported.

† 20 C.B. (N.S.) 1.

The public right of fishery, too, which *prima facie* exists in all navigable rivers, is subordinate to the public right of navigation. But each of these rights must be used with due regard to the reasonable exercise of the other. The right of navigation, "though superior, does not take away the right of fishery, but only limits it; and limits it only as far as it interferes with its own fair, useful, or legitimate exercise." *

The right of navigation is an ancient common law right, and, being so, its limits and the conditions of its exercise "are either to be found in the opinions of lawyers delivered as axioms, or to be collected from the universal and immemorial usage throughout the country."† The right, as it is gathered from these sources, cannot be altered or abridged except by Act of Parliament. Neither can the right be extended. Such as it was in the beginning, when the river over which it exists became navigable, so it remains, even although the modern improvements and appliances of navigation, and the necessities of extended commerce require its extension. The right must be the same right which has existed from time immemorial. For example, the right to moor in a recess in a river, even when a comparatively valueless right, seldom exercised, and by few people, cannot be taken away by building a wharf, although commerce would be greatly benefited by the change. "The public," said Lord Abbott, C.J., in *Rex v. Lord Grosvenor*,‡ where the point arose, "have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered."

The expression used in the last clause of the sentence just quoted led to a remarkable and almost successful attempt to introduce a new principle, by means of which the right of navigation might be made more elastic, more capable of

* Angell on Tidal Waters, 2nd edit., p. 81.

† Per Lord Kenyon in *Ball v. Herbert*, 3 T.R. 253.

‡ 2 Stark, 511.

being adapted to the varying and increasing needs and progress of commerce. The owners of a coal mine on the north bank of the Tyne, having been accustomed to load and unload, by means of keels, ships moored in the pool, erected staiths projecting into the river, which would enable them to ship coals directly from the wharf into the vessels at all states of the tide. It was proved that by means of these staiths coals could be loaded more quickly, more cheaply, and in better condition. They, however, blocked up a certain part of the channel along which craft could formerly have sailed, and were therefore a physical obstruction to the right of passage. The jury acquitted the defendants on the direction of Mr. Justice Bayley, that "if they thought that the abridgment of the right of passage was for a public purpose, and produced a public benefit, and if it was in a reasonable situation, and a reasonable space was left for the passage of vessels navigating the river,"* they ought to acquit the defendants. A rule *nisi* to enter a verdict of guilty was afterwards discharged by Holroyd and Bayley, JJ. (Lord Tenterden, C.J., dissenting,) on the ground that although the right of passage had been to some extent abridged, the abridgement was for the benefit of commerce, and was not unreasonable. "The right of the public upon the waters of a port or navigable river," said Bayley, J., "is not confined to the purposes of passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient to these ends." Lord Tenterden thought that the case should go for a new trial, because the jury ought not to consider the possible public benefit to arise from a nuisance, but merely whether, in fact, an erection complained of is or is not a nuisance. The case is now overruled, the dissenting opinion of Lord Tenterden having been approved by numerous later decisions. The error into which the majority of the Court in this case fell, and which was pointed out by Lord

* *Rex v. Russell*, 6 B. & C. 566.

Tenterden, consisted in this, that they treated the public right of navigation as a right which could be increased at one point, and diminished at another, altering it so as to suit the exigencies of commerce. The exercise of the right may be varied and changed in every possible way that a jury can be persuaded to consider reasonable, but the limits of the right itself must not be exceeded. And probably, on the whole, commerce is benefited by this rule. If the right of navigation could be abridged, altered, and extended, according to the notions of different juries, there would be great uncertainty, much interference with private rights, and constant litigation. Speaking of the arguments which prevailed in *Rex v. Russell*, Lord Denman, in *Rex v. Ward*,* said, "In the infinite variety of active occupation always going forward in this industrious community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with well-known public rights from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of being compelled to compensate any portion of the public which may suffer for their advantage."

The chief element of the public right of navigation is the right to pass and repass along and over a navigable river. This right may be exercised by every kind of vessel, in all parts of the river, and at all states of the tide. "We cannot conceive such right," said Lord Denman, speaking of the right of passage, "to have been originally other than a right locally unlimited to pass in all and every part of the channel.†

* 4 Ad. & E. 384.

† *Williams v. Wilcox*, 8 Ad. and E. 314.

But although the right be locally unlimited, it must be exercised with due regard to the particular circumstances of each river, so as to secure to each person an equally reasonable use of right of passage, as well as of the other rights forming the public right of navigation. Any person wrongfully placing an obstruction in the river, which prevents the convenient exercise of the right, is indictable. There may, however, be a physical obstruction of the right which is not indictable as a nuisance. A person exercising the same, or some other branch of the right of navigation may cause a physical obstruction for the time being to the right of passage, and, when that occurs, it becomes a question to reconcile the existence of the two inconsistent rights by compelling each to be exercised in the way that is most reasonable under the circumstances, and that will interfere least with the reasonable use of the other. "Each of the above-mentioned," said Mr. Justice Holroyd in *Rex v. Russell*, speaking of the rights collectively called the public right of navigation, "must at times occasionally yield and become subordinate as may be necessary or reasonable, at least in part, to some of the others. The public (that is each individual) has not an *absolute* right to navigate (*i.e.*, sail over) every part of the river, but only when there is not otherwise a legal pre-occupation (as in some cases there may be) by others." If an act which creates a physical obstruction of the right of passage is in itself a reasonable user of some public right, or the exercise of private right, then it is not a nuisance, but a legal pre-occupation of a part of the river, preventing, for the time being, the exercise of the right of passage.

And as it is not every physical obstruction that is a nuisance, so it is not every person that can abate or complain of an obstruction, even when it is a nuisance. An obstruction of a public right affects with equal prejudice each member of the public whose common right is obstructed. In providing a remedy for such an obstruction there are

therefore two evils to be avoided; on the one hand, to prevent immunity in his wrong-doing being secured to the person creating the nuisance because of nobody undertaking what would be everybody's duty, and, on the other, to protect the wrong-doer from being harassed by actions on the part of each one of the public, when one action would be sufficient to assert the public right. The Crown, as the guardian of the public interest, is therefore entrusted with the duty of indicting the offender, and no single person has any right of action in respect of an injury which is nothing more than the result of an infringement of a public right.

But if any one of the public suffer a particular injury, which, although it results from the violation of a right which he possesses in common with the rest of the public, affects his interests in a greater degree than it affects the rest of the public, then he has a right of action in respect of that particular damage. The distinction which gives a private person a right of action in the one case, while it denies it to him in the other, is very subtle, and, as it has been sometimes drawn in particular cases, almost unintelligible. It is a question rather of procedure than of legal right, and has been often misunderstood on account of the use of the word "private" to describe the particular injury suffered by the specially aggrieved member of the public. The case of *Rose v. Groves** has frequently been cited in support of the proposition that if an individual suffers private damage by the violation of a public right he has a right of action. That case decided nothing of the kind, being an action, not for the violation of a public, but for the infringement of a private right, namely, a riparian owner's right of access to his premises. But the erroneous view taken of that decision, recently corrected by the House of Lords in *Lyons v. The Fishmongers' Company*,† arose to a great extent from the loose and inaccurate use of the word private. Private damage

* 5 M. and G., 613. † Not yet reported.

literally means damage resulting from the infringement of a private right. When, therefore, it came to be applied to describe the particular damage the presence of which entitles one of the public to sue for the violation of a public right, then, by a vicious course of reasoning in a circle, the private rights of owners of riparian property abutting on navigable rivers came to be looked on as "private" in the same sense only that the right of a person suing in respect of particular, or, as it was wrongly called, private damage, was private. The nature of the particular damage which gives a right of action against the creator of a nuisance in a navigable river is very clearly defined in the case of *Rose v. Miles*.* The defendant in that case had fastened a barge across a navigable creek, and thus prevented the passage of a barge belonging to the plaintiff. The Court held that the action would lie because "the present case admits of this distinction from most of the other cases, that here the plaintiff was interrupted in the actual enjoyment of the highway."† The damage, proof of which is necessary to support an action in respect of a nuisance, is then nothing more than an expression for the distinction drawn for the purposes of procedure between the damage sustained by all the public in whom, theoretically, a public right is vested, and the damage sustained by that portion of the public who were actually prevented by the nuisance from using the right on a particular occasion, and thereby suffered special damage.

The authorities which establish the existence of the right of passage, establish also the other rights comprised within the full meaning of the phrase "public right of navigation," the next in importance of which is the right of anchorage. The proprietary right of the Crown in the soil is subject to the public right of anchorage, and as the "liberty of passage is not suspended when the tide is too low for vessels to float, it is no excess if a vessel which cannot reach her place of

* 4 M. & S. 101.

† Per Dampier, J.

destination in a single tide, remains aground till the tide serves; although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding." *

But the right to anchor must not be confounded with the right to moor for the purpose of loading and unloading. These are wholly distinct rights, exerciseable under different conditions. It is a matter of considerable practical importance, if one is rightly to understand the authorities, to bear this distinction in mind, because a right to anchor may exist where there is no right to moor; † and it is all the more necessary to do so, because the language of some of the cases is rather loose in this respect, the word "moor" being used in two senses, at one time as synonymous with "anchor," and, at another, as implying the exercise of a right to load and unload.

The right to anchor is not locally unlimited, like the right of passage. It can be exercised only in such places as are usual and reasonable, having regard to the circumstances of the river. In the case of *Rose v. Miles*, the plaintiff succeeded, not because the defendant had no right to anchor, for the creek was navigable, and that right therefore existed, but because he anchored in an unreasonable place and manner. So, although the right of fishery is subordinate to the right of navigation, yet, if the master of a vessel should unnecessarily anchor in fishing-ground, he is answerable in damages. ‡

One of the leading cases on the subject of the right of anchorage, is *The Mayor of Colchester v. Brooke*, § which was decided by the Court of Queen's Bench in the year 1845. The plaintiff was the owner of certain oyster-fishery beds,

* Hall's Essay on the Rights of the Crown in the sea-shores of the Realm. Second Edition, by Richard Loveland, p. 43.

† "Anchorage and moorage are very different things," per Lord Mansfield in *Stephen v. Costor*, 2 Burr. 1408.

‡ Angell on Tidal Waters, 2nd edit. p. 81.

§ 7 Q.B. 889.

and sued the defendant for damage caused to these beds by the defendant's ship grounding thereon. The defendant pleaded that, the river being navigable, he had a right to ground his ship, although, by so doing, he damaged the oyster-beds. Coltman, J., at the trial, directed the jury that "if a river is navigable, it is so whether the tide is in or out;" and the jury, accordingly, found a verdict for the defendant. A rule *nisi* for a new trial on the ground of misdirection contained in the above passage, was obtained by the plaintiff, and afterwards discharged by the Court of Queen's Bench. Lord Denman, C.J., in giving judgment, said, "the plaintiffs contended that a right to navigate, pass, and repass, was merely a right to float along, and that the facts shewed that in this part of the river such a right could not exist at all times of the tide." And, after remarking that no authority directly in point had been cited at the bar, and that the Court, after considerable search had been unable to find any, but that, upon principle, the matter seemed clear, he continued, "It is more reasonable to hold that the term 'navigable' is a relative and comprehensive term, containing within it all such rights upon the water way, as, with relation to the circumstances of such river, are necessary for the full and convenient passage of vessels and boats along the channel."

It is clear from the judgment in the last-mentioned case, that the right to anchor can be exercised only in such places, and for such times, as may be necessary for the convenient exercise of the right of passage, and is part of the public right of navigation, not because of its having any connection with the right to moor for the purpose of loading and unloading, but because the right of passage could not be conveniently exercised without it. This is made still more clear by the case of *Gann v. The Free Fishers of Whitstable*,* decided by the House of Lords in the year 1865. That was an action to try the right of the Lord of the Manor of Whitstable to exact a payment for the right to anchor in the sea

* 20 O.B. (N.S.), 1.

below the low-water mark, but within three miles of the shore; and the House of Lords held that the Crown could not grant such a right except for some consideration of public benefit, because the property of the Crown in the *fundus maris* is subject to the public right of navigation. "The right to anchor," said Lord Westbury, "is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right." Lord Wensleydale's expressions are to the same effect: "That in an arm of the sea, where the *fundus maris* is the property of the Crown, every subject of the Crown has a right to navigate and to cast anchor when and where he thinks fit, as a necessary means of safe navigation."

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(To be continued.)

VII.—SELECT FOREIGN CASES.

Advocate; Privilege; Professional Secret.

ITALY.—*Advocates and Procurators may decline to give evidence on matters confided by client, and such refusal being devoid of legal effect on case, Judge may not take it into consideration in sentence.* Court of Cassation, Palermo, 23rd Nov., 1874. Solli and Floritta, appellants.

This was an appeal to have judgment reversed, on three grounds common to the two appellants, and one special to Floritta, viz.—

1st. Alleged violation of Art. 323, n. 3648, n. 1, Code of Penal Procedure, constituting absence of grounds for judg-

ment owing to refusal to consider declaration of witness Scherma, an advocate.

2nd. Alleged violation of Art. 688, Cod. cit., in subsequently taking said declaration into consideration, and even making it principal ground of judgment.

3rd. Alleged violation of Art. 323, n. 3, and Art. 640, n. 1, Cod. cit., constituting absence of grounds for judgment owing to refusal to hear witness Scherma a second time.

4th [special to Floritta.] Alleged violation of Art. 628, and Arts. 102, 103, Cod. cit., modified by decree of Royal Lieutenant, 17th Feb., 1861, imputing absence of grounds as to guilt of Floritta, and raising question of the constituent elements of swindling (*truffa*), of which he was accused.

The Advocate Scherma had been summoned as a witness for the Crown [*Pubblico Ministero*], and, after taking the oath, declared in answer to the interrogation of the President of the Correctional Tribunal, that he had been called upon by Solli and another to draw up an agreement; and that his knowledge of the case having been obtained in the exercise of his profession as an advocate, he declined to answer the questions put to him. The Inferior Court, and the parties to the case, both accepted this refusal, but the Court took it into consideration in giving judgment.

On appeal, the Court of Cassation considered the texts of Roman Law, and Articles of Code of Penal Procedure, and Code of Two Sicilies, bearing on points involved; referred to Digest, [lib. 22, tit. 5] l. 25, *De Testibus*, "*Mandatis cavetur, ut præsides attendant ne patroni in causa cui patrocinium præstiterunt, testimonium dicant*;" also to similar dispositions in Codice Estense, Art. 137, s. 1, and Codice Sardo, Art. 274, establishing the general principle, and *Held* that the evidence given under examination is the only ground for judgment; that the witness Scherma was protected in his refusal by the professional secret, and, accordingly, Reversed Judgment of Lower Court.—(*Circolo Giuridico*, Palermo, *Decisioni Penali*, 1874-5, Pte. iii., pp. 34-37).

Extradition.

MEXICO.—*Culpability* [Culpabilité] *not established. Refusal to Extradite.* District Court of Tamaulipas North, Mexico, reversing decision of Judge of First Instance at Matamoros, 3rd Sept., 1875.

George Harras, *alias* Lennep, American citizen, of German origin, escaped from prison of Brownsville, Texas, and took refuge in Northern Mexico. On 31st August, 1875, the Judge of First Instance at Matamoros received demand for his Extradition from the Judge at Brownsville, Harras having been imprisoned there on a criminal charge still pending, and being at time of demand in prison at Matamoros, for infraction of police regulations there. The identity of Harras was proved. The Judge of Matamoros declined to extradite on account of insufficiency of documents, but asked the police to keep Harras in confinement until final decision on extradition. The Judge of Brownsville sent a second demand, accompanied by the original documents relating to the charges against Harras. The Judge of Matamoros, on 3rd Sept., 1875, gave orders for Extradition, on the ground that although no proof of culpability of the accused had been given, a writ had been issued for arrest of Harras; and, therefore, sufficient grounds for proceeding against him might be assumed, and the crime specified (assault with armed violence, *attaque à main armée*) was within the cases enumerated in Art. 3 of Extradition Treaty of 23rd May, 1862, with U.S.A.

The District Judge of Tamaulipas, relying on 1st Art. of said Treaty, viz., "Extradition shall only take place when the fact of the perpetration of the crime shall be so proved, that the accused would have been lawfully arrested and tried in accordance with the law of the land of asylum, if the crime had been committed there;" and on Arts. 14, 15, and 16 of Mexican Constitution of 1857, *Held* that the documents produced contained no proof of culpability, reversed the decision of Judge of First Instance at Matamoros, and

declared that the Mexican Federation accorded protection and "amparo" (asylum) to Harras *alias* Lennep. ("El Toro," Mexico, 1875.)

Jurisdiction.

(1.) FRANCE.—*Rights of Domiciled Foreigner.* Tribunal of Commerce, Marseilles, 17th March, 1875. *Montanaro v. C.^{ie} Italo-Flatense.*

The long establishment of a foreigner in France gives him the right to exercise in commercial affairs the judicial powers belonging to a Frenchman, and, consequently, to sue a foreigner before the commercial jurisdiction of his domicile.

(2.) *Application of Civil Code.* Civil Tribunal of Marseilles, 2nd Chamber, 16th March, 1875. *Viè v. C.^{ie} Segovia Cuadra.*

Art. 14 of Civil Code, which permits a Frenchman to sue a foreigner before a French Court, applies to obligations resulting from delicts and quasi-delicts, as well as to obligations arising from contracts.

(3.) *Convention of 1862.* Tribunal of Commerce of the Seine, 7th November, 1874, confirmed by First Chamber of do. in Paris, 19th March, 1875. *London, Chatham, and Dover Rail. Co. v. South-Eastern Rail. Co.*

French Courts may declare themselves incompetent to try a case brought before them arising out of a contract entered into in France, but which is really a reclamation between two foreign railway companies in respect of passenger's luggage carried by train to a foreign country. The International Convention of 17th May, 1862, between France and Great Britain, permitting companies of those countries to exercise respectively their rights, "only gave the foreign companies a right to sue in France, and did not modify the general rules of competence." "In a suit between foreigners the competence of French Courts is permissive (facultative)." "There is just ground for French Courts to declare themselves incompetent when the question is concerning an act

done on foreign soil, and which might give rise to the application of the provisions of English Law." ("Dictionnaire de la Jurisprudence Française," in Journ. de Droit Int. Pr., 1876, p. 179, et seq.)

(4.) EGYPT.—Court of First Instance, Cairo, 10th April, 1876. *The New Courts not competent to take cognizance of suit by Ottoman subject against Egyptian Government. Ottoman subject cannot acquire foreign nationality without previous consent of his Government.*

Osman Rhaleb Bey (son, and one of the heirs of Kour-schid Pasha Parmokus, Generalissimo of the Egyptian Army,) a naturalised Prussian subject, dwelling at Cairo, v. *The Egyptian Government*, per Governor of Cairo. Competency of Court was challenged by defendant, on plea that plaintiff was an Egyptian subject, and must, therefore, go to Local Courts. Plaintiff put in Letters of Naturalisation granted to him at Berlin, 9th August, 1867, as well as various Letters of Protection (*Patentes de Protection*) from Prussian Consulate. Court acknowledged, on the evidence, that the Prussian authorities had recognised plaintiff as a Prussian subject, but considering, that the question to be decided was whether the State to which plaintiff belonged should recognise him as a Prussian subject on his return to Egypt; that the right to recognition or non-recognition of foreign naturalisation flows from the principle of national sovereignty; that, according to Mussulman Law, an Ottoman subject cannot, without previous consent of his Government, throw off his nationality, and assume another; which principle was confirmed for all subjects of the Sublime Porte, whether Mussulmans or not, by Firman of 19th January, 1869, and is also adopted by various European States, (*e.g.* Austria, Prussia, Wurtemberg, Bavaria), and was recognised in regard to plaintiff by the Prussian Consul himself, who considered plaintiff to have a double nationality, *Held* that International Court was not competent, and condemned plaintiff in costs. (Journ. de Droit Int. Pr., 1876, p. 192.)

(5.) EGYPT.—*Foreign Bankrupt. International Courts incompetent to declare Bankruptcy of Foreigner on request of Foreigner of same Nationality.* Court of Appeal, Alexandria, 19th April, 1876. *Meunier v. Nivière.*

Court considering that Art. 9 of “Règlement” of Judicial Organisation, and Art. 5 of Civil Code, gave jurisdiction to the New Courts, both in civil and commercial cases, only over suits between natives and foreigners, and between foreigners of different nationalities; that the French Ministry for Foreign Affairs declared in its Report to the National Assembly, 7th May, 1874, that suits between French subjects, with the exception of real actions (*Actions réelles immobilières*), were retained under the exclusive jurisdiction of the French Consuls; that the right of the International Courts to declare Bankruptcy could only be exercised when mixed interests were proved, and that no such proof had been given in present case: *Held* that the French Consular Court alone had jurisdiction. (*Journ. de Droit Int. Pr.* 1876. p. 194.)

The following is the text of Art. 9 of the “Règlement,” quoted above, as given in the “*Journal de Droit International Privé*,” Nov.—Dec., 1875:—

“Règlement d’Organisation Judiciaire pour les Procès Mixtes en Egypte. Ch. 1, s. 2. Compétence—Art. 9.

“Ces Tribunaux connaîtront seuls de toutes les contestations en matière civile et commerciale, entre indigènes et étrangers et entre étrangers de nationalité différente en dehors du statut personnel. Ils connaîtront aussi de toutes les actions réelles immobilières entre toutes personnes, même appartenant à la même nationalité.”

Reviews of New Books.

A Digest of the Law of Evidence. By JAMES FITZJAMES STEPHEN, Q.C. Macmillan & Co. 1876.

Many circumstances combine to make the appearance of this book an event of much interest to English lawyers. It is one of the first—if not the very first—of the serious attempts that have been made to carry out that reform of the expression of the Law which is spoken of as Codification. The book is, in fact, a Bill which could not be carried through the House of Commons, and its publication, as a private venture, will have much the same effect as the Bill would have had, except in so far as the latter would have made changes in the substance of the Law. Other authors may be encouraged by Mr. Stephen's example, to apply the same method to other chapters of the Law, so that when the time comes for codification to be seriously considered by the House of Commons, a great part of the work may be found to have been already done. It is interesting in another way, as a lesson derived from our experience in trying to make our Law intelligible to the subject people of India. Codification of some sort is a necessity of our position in that country. In imposing our Law on the people of India we are bound to make it as plain and as brief as the nature of the thing will permit. Accordingly, for many years, the simplification of the English Law applicable to India has been going on, under the direction of the accomplished lawyers sent out from England as legal Members of Council. When Mr. Stephen held that office the Law of Evidence fell to his share, and if it had not fallen to him to draw the Indian Evidence Act of 1872, we should probably not have the English Digest now. Of course all that was legislative in the Indian Act and the English Bill is omitted from the present work, which is strictly a Digest of the existing Law. It is, moreover, one of the first fruits of that reform in Legal Education which has been brought about within our own time.

As one of the Professors in the Inns of Court, Mr. Stephen has felt it to be his duty to do what he could to assist the studies of those who attend his lectures, and to that conviction the publication of the present work is due. It ought to be welcome news to all of us, that so huge a mass of Law as that contained in the ordinary treatises on Evidence can be compressed into the compass of the tiny volume before us. If other authors can successfully emulate Mr. Stephen in cutting down the bulk of the Law they will deserve our gratitude, even if they do nothing in the way of re-arrangement.

When we remember the portentous size of such books as Taylor and Roscoe, it seems at first sight absurd to suppose that all that is material in them should be expressed in a little book of less than 300 pages. We may quote Mr. Stephen himself on this subject:—"The last edition of Mr. Taylor's work on "Evidence" contains 1,797 royal 8vo. pages. To judge from the table of cases, it must refer to about 9,000 judicial decisions, and it cites nearly 750 Acts of Parliament. The last edition of Roscoe's "Digest of the Law of Evidence on the trial of actions at Nisi Prius," contains 1,556 closely printed pages. The table of cases cited consists of 77 pages, one of which contains the names of 152 cases, which would give a total of 11,704 cases referred to. There is, besides, a list of references to statutes which fills twenty-one pages more. Best's "Principles of the Law of Evidence," which disclaims the intention of adding to the number of practical works on the subject, and is said to be intended to examine the principles on which the rules of evidence are founded, contains 908 pages, and refers to about 1,400 cases." The plan adopted by Mr. Stephen for reducing this unwieldy mass is described in the introduction. First of all, he has cut off the subject of Evidence from other branches of the Law, with which it is usually mixed up. The question, for example, what may be proved under particular issues, he regards as belonging to the subject of Pleading rather than Evidence. Again, he excludes the greater part of the subject of Presumptions as belonging properly to the different branches of the Substantive Law. In the same way, he excludes rules of Practice, which are often discussed at great length in treatises on the Law of Evidence. Having thus limited the range of the subject, the rest is accomplished by a sheer effort of condensation. Mr. Stephen substitutes for the statement of judicial decisions, which is about all that the ordinary text-book gives, a statement in his own language of the rules and principles which such cases

imply. Any one who has tried to formulate for himself a general rule covering all the decisions on any particular point of law, will appreciate the difficulty of this task. Like a great deal of the work that is done by lawyers, the worth of the result is in an inverse ratio to its size. Mr. Stephen does not confine this method of treatment to the *Case-Law*. It is one of the novelties of the book that it deals as fully with Statutes as with decisions, setting forth their meaning in the shortest and simplest language possible. "In many cases," says Mr. Stephen, "the result of a number of separate enactments may be stated in a line or two. For instance, the old Common Law as to the incompetency of certain classes of witnesses was removed by parts of six different Acts of Parliament—the net result of which is given in five short articles."

Fifteen chapters, containing 130 short articles, give us the substance of the Law of Evidence—the article, in many cases, being merely a single short sentence. The article is usually followed by illustrations or examples, selected for the most part from reported cases, but, in some instances, invented by the author himself. The practice of illustrating general principles by particular instances is borrowed from our legislation in India, and might, we agree with Mr. Stephen in thinking, be introduced with advantage into our legislation at home. Mr. Stephen did actually propose to introduce it in his Evidence Bill, but Lord Coleridge, then Attorney-General, did not believe that Parliament would approve of it. Considering how the details of legislation, even on the most technical subjects, are fought over in Committee, we are not surprised that the Attorney-General declined the responsibility of steering a bill full of speculative examples through the House of Commons. The use of illustrations is to make the general rule more easily intelligible, and Parliamentary draftsmen say that to be intelligible does not favour the chances of a disputed clause. In a text-book, however, illustrations are free from any objection on this score, and the use of them simply amounts to this, that whereas the ordinary text-writer gives us nothing but illustrations, leaving us to guess at the rule which they illustrate, here we have the rule set forth dogmatically in the first instance, and illustrated by special cases afterwards. The articles and illustrations are accompanied by foot-notes, giving the authority relied upon by the author; and there is an appendix of notes, explaining more fully the law laid down in the text. There is, perhaps, a certain amount of inconvenience in these arrangements. To get at all that Mr. Stephen has to say,

on a rule of law we have sometimes to consult four separate sections—viz., the Article, the Illustration, the Foot-note, and the Appendix.

Such being the method, we may ask ourselves how the work has been done. Does the book contain a complete statement of the principles of the Law of Evidence, and is this statement simple and intelligible? To the first of these questions, we have no hesitation in answering in the affirmative. A comparison of Mr. Stephen's articles with any of the large text-books, will, we think, establish the fact that no rule of importance has been omitted. We have even come across rules which seem to have escaped the notice of some recent writers of text-books. We should say that lawyers, most familiar with the rules of evidence in practice, will find the sum of their knowledge presented here in a form which it certainly never assumed in their own minds. Mr. Stephen has, in fact, made the inductions for us all, which each of us has hitherto, with more or less success, attempted to make for himself. From this point of view, we should say that the book will be of more use to a lawyer of some experience than to a student. The former will at once recognise the accuracy of the statements, and will readily catch their meaning, where to a beginner they may possibly seem obscure.

To the second question we are bound to answer that Mr. Stephen, in his desire to be brief, has not in all cases escaped from being obscure. Part I. in particular appears to us to stand in need of a good deal of explanation before it can be considered easy reading for a beginner. Mr. Stephen's literary style is, as everybody knows, marked by singular lucidity and straightforwardness—to say nothing of its other qualities. His habitual clearness of thought and expression is such, that the necessity of being specially careful in framing definitions might not occur to him, and we cannot help thinking that the language of some of the Articles is not quite so precise and intelligible as it might be. Take Article 4, for instance:—"When two or more persons conspire together to commit any offence or actionable wrong, everything said, done, or written by every one of them in the execution or furtherance of their common purpose, is deemed to be so said, done, or written by every one, and is a relevant fact as against each of them: *but relations of measures taken in the execution or furtherance of any such common purpose are not relevant as such as against any conspirators except those who make them, or are present when they are made.*" The word "relations" must here mean "statements"—which is surely, considering its other

meanings, an unfortunate use of the word ; and the phrase "to make relations," is so bewildering that we are tempted to suppose that by "them," in the last line, is meant not "relations of measures" but "measures." To "make measures" is not a more uncommon phrase than "to make relations." Again, the qualification expressed by the words "as such," requires some little reflection before its meaning becomes apparent. We venture to say that few people, even with the help of the illustrations, will think that the meaning of the whole sentence is brought out as clearly as it might be. Verbal criticism of this kind is justified by the great importance of keeping clear, in such a book as the Digest, of all difficulties created by the mere form of the expression.

Mr. Stephen promises, if this undertaking should be favourably received, to apply the same process to some other branches of the law. We welcome the promise most heartily, but we may be allowed to suggest to Mr. Stephen a doubt whether he ought to undertake the work single-handed. Why not gather round him a few competent men who will treat other portions of the law, under his general direction, as he has treated the Law of Evidence? He has an example in the success of similar undertakings in History and Science, to which men almost as distinguished as himself have lent a hand. With a good staff of subordinate workers Mr. Stephen might soon give us a series of Digests, covering the entire field of the law. Even as a publisher's speculation such a scheme ought to be a success.

The Law and Practice in Bankruptcy. Second Edition. By ROLAND VAUGHAN WILLIAMS, Esq., of Lincoln's Inn, Barrister-at-Law ; and WALTER VAUGHAN WILLIAMS, Esq., of the Inner Temple, Barrister-at-Law. Stevens & Sons. 1876.

This is a new edition of the authors' book on Bankruptcy which, we are glad to see, has had a satisfactory amount of success. The first edition was published shortly after the Act of 1869 came into operation, and proceeded upon the plan of setting forth in juxtaposition the new law and the old cases applicable to the same subject-matter. The authors did not profess to give all the authorities, but only the result of the authorities, so that the reader might be able to resort to the reports without having always to turn to treatises on the Law of Bankruptcy as it existed previous to the Act of 1869. To this modest design the authors remain faithful in their new edition, but they have of course a large accession of new cases to work into the substance of the book. In addition to the Bankruptcy Act, the Debtor's

Act, the Bankruptcy Repeal and Insolvent Court Act of 1869, with the related Rules and Forms, are printed in full. The book is thus, in form at least, rather an edition of the Act of Parliament than a treatise on the Law of Bankruptcy. There is a good deal to be said for this arrangement in a subject which is so completely governed by statute as Bankruptcy; and, at any rate, it saves us the trouble of constantly referring to the Act of Parliament in an Appendix. On the other hand, one loses the instructive history of Bankruptcy legislation, as it is presented in more systematic treatises, such as that of Robson. Inasmuch as Bankruptcy still contains many unsettled problems, it would be well perhaps to keep the main objects and leading difficulties of Bankruptcy Law, as a whole, more vividly before the eye of the reader than is possible in a mere edition of the Act.

In the book before us, however, great care has been taken to point out the changes effected by successive statutes. The legislative history of each section has been given, so far as it has a history—sometimes in great, but not excessive, detail. Along with the section of the new Act, we have a statement of the old law on the same subject, pointing out the mischief aimed at by the enactment, and the reason for the change. Some of these notices are little treatises in themselves. The note on the 15th section (descriptions of bankrupts' property divisible among creditors) fills about sixty closely printed pages. The first of the exceptions (property held by the bankrupt on trust for any other person) alone occupies about fourteen pages, and the "reputed ownership" clause occupies nearly thirty. The last note contains a comparison between the doctrine of reputed ownership and the principles of the Bills of Sales Act, which seems to us to be, in completeness and conciseness, a very good specimen of editorial workmanship. It would be more correct, in view of the carefulness and copiousness of some of these notes to sections, to describe the book as a treatise on Bankruptcy, following the order of the latest statute on the subject, than as a mere edition of the statutes with notes. Not only are the statutory changes carefully recorded, but the legal history of doctrines and phrases receives a good deal of attention. No matter how complete may be the system created by statutes like the Bankruptcy Act of 1869, they will always be found to take for granted principles, and to make use of phrases, which require to be explained by reference to the general law. In this respect "Williams on Bankruptcy" is quite satisfactory—the more so, perhaps, as the authors have wisely "not attempted to give all the old authorities, even where the law seems unchanged, but rather the result of those authorities."

Internationalism, by His Excellency DON ARTURO DE MARCOARTU, Ex-Deputy to the Cortes, with *Prize Essays on International Law*, by A. P. SPRAGUE, Counsellor-at-Law, U.S.A., and PAUL LACOMBE, Advocate at the French Bar. Stevens & Sons. 1876.

It is not a little curious, and perhaps somewhat unfortunate, that Don Arturo de Marcoartu, whose aim is peaceful, and whose Prizes had for their object the promotion of International Arbitration and Codification, should have chosen a title which is suggestive of subversive ideas. Yet it must be admitted that "Internationalism," in the natural sense of the phrase, is the dominant characteristic of a work in which a former Deputy to the Spanish Cortes, and an American and a French Jurist give us their views on the possibility of constituting an International Tribunal of Arbitration to decide the disputes, and a Common Code to regulate the relations, of the Civilized Nations of the World.

The events of which Eastern Europe has been the theatre since the adjudication of M. De Marcoartu's Prizes, at the Brighton Congress of the Social Science Association, may seem at first sight almost entirely to negative the possibilities of which Mr. Sprague and M. Lacombe treat in the volume now before us. But our authors, and those who think with them, would doubtless meet such a view by the not unreasonable plea that it is the very want of such a Code and such a Tribunal as they argue for which has brought International relations in Europe to such a pitch of confusion. There are probably many who would admit that there is no little justice in this plea, though they may be unable to see their way to applying the suggested remedy, and may think that even if applied it would not prove a panacea. Mr. Sprague's language seems to indicate that he fully recognizes these difficulties, and that he does not expect that wars would cease on the adoption of the scheme which he advocates, but that he does expect the frequency of war would be greatly lessened, and the complications of Diplomacy diminished. As between Codification and Arbitration, Mr. Sprague is a partisan of the latter, though, as he points out, practically some sort of Codification would be implied by Arbitration. And on Arbitration itself he appears to accept the view taken of it by Mr. Mountague Bernard and Professor Bluntschli, at the Foundation Conference of the Association for the Reform and Codification of the Law of Nations, at Brussels, in 1873, quoting Mr. Bernard's opinion, by an odd misprint (p. 96), under the name of "Professor

Montague." M. de Marcoartu seems to think that a "Plébiscite" alone should be declaratory of Peace or War, and that this would be a great safe-guard. But the course of events both in 1870 and at the present moment does not favour that view. Anyone who recalls the universal enthusiasm that raised the cry "à Berlin," in 1870, and who believes the declaration, so often repeated within the last few months, that it is the Russian people who have been urging war upon an unwilling Czar, will have grave doubts as to the value of this mode of lessening the chances of war. Would that species of "Staatenbund" which appears to be the ideal of M. de Marcoartu and Messrs. Sprague and Lacombe be a more valuable mode? It seems to us that in the instances which they adduce in favour of the principle there was an antecedent force tending to closer union which is wanting among the Nations as a whole. "Italianism," as M. de Marcoartu calls it, was "the political realization of the geographical expression of Italy." Turning to Germany, we find that the "Zollverein, conceived by Prussia, prepared the present evolution of Germanism." Besides these there are to be reckoned Scandinavism, Iberianism, and not the least potent just now, Pan Slavism. All these, which M. de Marcoartu considers as "forms assumed by Internationalism during the ages," seem to us more properly described as forms or expressions of the idea of Nationality, a theory of much less wide scope than "Internationalism" as conceived by our authors. It may, indeed, be questioned whether the two are not to a certain degree, antagonistic. We have at the present moment before us the newest claimant to the expression of what we prefer to call the National feeling in the idea of Pan Slavism, which is one of the forces underlying the complications in Eastern Europe. But all these various national expressions of brotherhood fall short of that universal brotherhood which "Internationalism" would seem to inculcate, and which Mr. Sprague would embody in the "Association of Nations," receiving the International Code, and acknowledging the force of the decrees of the "High Court of International Arbitration." In the midst of wars and rumours of wars, this autumn, which has seen the Centennial of the United States of America celebrated in the City of Brotherly Love, has also seen the re-assembly of the American International Code Committee. We may, at least, give our friends across the Atlantic credit for indomitable perseverance in a good cause, and we doubt not that it is a perseverance which will ultimately reap its reward; though not necessarily on the lines laid down by the authors of "Internationalism." If

such a High Court had been in existence now as is sketched out by Mr. Sprague and M. Lacombe, the affairs of the Slavonic populations in the Turkish Empire would no doubt have been submitted to it. But we doubt whether the Court would have found the settlement of the question much more easy and free from the pressure of conflicting political interests than the Chancellors, and Foreign Secretaries, Ambassadors, and Consuls who are at present engaged in trying to untie, or in the last resort to cut, this Gordian knot of State-craft. "L'heure a sonnée," wrote M. Lacombe, "de réaliser la dernière venue de ces idées [viz., Arbitrage et Codification]." And the same writer starts from this point, as containing within it "la médication de la guerre," to advance, if possible, still further. We are not sure that there would not have been a certain "médication de la guerre" in the case now absorbing so much of the attention of Europe, if the rules of Neutrality ordinarily prevailing among Nations had been laid down distinctly by such a Court as Mr. Sprague supposes his Association of Nations to establish. The authors of "Internationalism" evidently wrote under the impression that an era of universal Peace was approaching. So men thought in 1851, and so they will doubtless think again, but only to be yet again undeceived. Still it is much that men of goodwill towards Peace should continue to study whatever in Law and Philosophy may tend most to that end. For a long while their own work will seem to be but weaving ropes of sand. So it is, to all appearance, at the present moment, with the plans sketched out by Mr. Sprague and M. Lacombe. But whatever in their theory is based upon Scientific and Philosophical Truth will outlive the accidental forms in which they have clothed it. We cannot yet decide what will be taken and what will be left. Meanwhile, we may offer to Mr. Sprague as a specially apposite encouragement, the words of Henri Ahrens, "Par une heureuse inspiration les Etats Unis ont adopté pour leur fédération la belle bannière dans laquelle ne figurent plus de bêtes sauvages symboliques, mais qui brille d' autant d'étoiles qu'il y a d'états-membres de l'Union. Une telle bannière est le vrai symbole fédératif."

Leading Cases on the Law of Torts, determined by the Courts of America and England. With Notes. By MELVILLE M. BIGELOW. Boston: Little, Brown & Co. London: Sampson Low, Marston & Co. 1875.

Mr. Bigelow has deservedly achieved a high reputation as a legal writer on the other side of the Atlantic, and we have

pleasure in welcoming his "Leading Cases on the Law of Torts" as an addition to legal literature valuable alike to the English and American lawyer. Mr. Justice Markby winds up his able article on Analytical Jurisprudence in our last number with the following pertinent enquiry:—"I have heard of such a suggestion as a codification of the Law of Torts. Has any one yet seriously considered what the Law of Torts is, in England or in any other country?" The Law of Torts is, indeed, a wide subject, and, in order to keep his work within serviceable limits while affording "a full and complete view of the essential doctrines of the Law of Torts," Mr. Bigelow has wisely confined himself to its typical branches. Bailments, marine torts, statutory torts and the torts of persons under legal disability, are omitted except where those topics and the leading doctrines regarding them are incidentally referred to. The author's system is to give, from the reports, the leading cases on the various species of Torts, followed by notes containing (1) a historical consideration of the rise and growth of the law as thus represented, and (2) a statement in greater detail of its present aspect. To take an example. Under the head of "Deceit" we find: "*Pasley v. Freeman*, leading case. (Note on Deceit generally; Historical aspects of actions of Deceit; Knowledge of falsity, including misrepresentations of agents; Intention of Defendant; Acting upon the misrepresentation; Representations concerning solvency.) *Malachy v. Soper*, leading case. (Note on Slander of Title.) *Marsh v. Billings*, leading [American] case. *Sykes v. Sykes*, leading case. (Note on Trade-marks.)" The historical notes are worthy of special praise, and will commend themselves to all who take an interest in legal history. At the same time they are kept carefully distinct from statements of the existing law, so that neither the student nor the practitioner can be misled. We congratulate Mr. Bigelow on having produced a legal text-book well designed, carefully and conscientiously worked out, and lucidly expressed.

Principles of the Common Law. An elementary work intended for the use of students and the profession. By JOHN INDERMAUR, Solicitor, author of "Epitomes of Leading Cases," &c. Stevens & Haynes. 1876.

Mr. Indermaur, whose experience in "coaching" candidates for the examinations of the Incorporated Law Society renders him peculiarly fitted for the task, has acquired a deservedly high reputation as a writer of convenient epitomes and compendiums

of various branches of the Law for the use of students. In the present volume he has essayed a somewhat more ambitious rôle, the practitioner as well as the student being kept in view. We regret to see that Mr. Indermaur, like Dr. Broom in his "*Philosophy of Law*," has adopted a title much more comprehensive than the subject matter of his work warranted. It is utterly illogical and misleading to exclude from "*The Principles of the Common Law*," the whole subject of criminal jurisprudence, and to restrict that title to "the popular divisions of Contracts and Torts," with a brief appended discussion of the subjects of "Damages" and "Evidence in Civil Cases." Within the limits, however, which the author has assigned to himself, he has certainly, without any pretention to scientific treatment, given proof of praiseworthy industry, accuracy, and clearness of exposition, which cannot fail to be of the greatest advantage to the Law Student, whose wants in the Examination-room Mr. Indermaur has had chiefly in view. The practising Solicitor will also find this a very useful compendium either as a refresher to the memory, if read through, or as an index referring him to the text-books or cases where the law on any point may be easily found in ampler detail. Care has evidently been taken to note the latest decisions on important points of law, and the short but important Act Amending the Law relating to Crossed Cheques (39 & 40 Vict., c. 81, passed 15th August, 1876) is set out in the Appendix. A full and well-constructed Index supplies every facility for ready reference.

Leading Cases in Constitutional Law briefly stated, with Introduction, Excursuses, and Notes. By ERNEST C. THOMAS, Bacon Scholar of the Hon. Society of Gray's Inn, late Scholar of Trinity College, Oxford. Stevens & Haynes, 1876.

The author of this little work seems to have had in view the needs of students, who find that "some knowledge of the chief cases in Constitutional Law is now required in many examinations." This is, happily, becoming a more frequent requirement, though, when we consider the numerous and illustriously filled Chairs of Constitutional Law which exist in Foreign Universities and Schools of Law, we cannot consider that the subject has yet received its due meed of honour in this country. We welcome Mr. Thomas's book as challenging attention to a very important branch of legal study, though we could wish it had been compiled with a view to a higher class of readers than the passmen, to whom its brevity appeals. Moreover, it should be remembered

that brevity is not necessarily synonymous with clearness. We do not think Mr. Thomas has sufficiently considered this point. His statement for instance, of the "cause célèbre," *Forbes v. Cochrane*, is inadequate, for it does not bring out the fact that the British-born owner of the fugitive slaves had a Spanish domicile, nor the very material fact that the ship-of-war on board of which the slaves were received was not, as erroneously stated in the margin of the Reports, "on the high seas," but "within one mile of the shore;" both of which facts Sir Travers Twiss was careful to set out in his argument relating to this case in our February number. So, again, in stating the case of "*Le Louis*," Mr. Thomas omits to set forth that the French vessel was captured "on the high seas;" the case being, to use the words, of Sir Travers, one of "active aggression by a king's cutter without any sanction of Treaty-right, against a French merchant-ship on the high seas, carrying on the slave-trade in accordance with the Laws of France." In the "Excursus" on Allegiance and Aliens, p. 37, we observe a curious misprint of "subject" for "sovereign." Mr. Thomas's treatment of Calvin's case seems to us to share in the fault we have already noticed. He does not set forth "the concrete circumstances so helpful to the memory," which are clearly and concisely stated in Taswell-Langmead's "*English Constitutional History*," p. 471, a work often quoted by Mr. Thomas, but, singularly enough, never under its proper title. We do not quite understand what is the "absurdity" with which Mr. Thomas charges the "decision" in Calvin's case, although some of the arguments used were of doubtful authority then, and would seem absurd now. To the student, who is obliged in a brief space of time to make himself acquainted with the principal points in some of the most celebrated cases in Constitutional Law, Mr. Thomas offers the help of a convenient *précis*, excellently printed, and furnished with a copious Analytical Index. But, for the aspirant to honours in a Legal Examination, the book has yet to be written which should guide him through the "prolixity" of Broom and the Reports, to a clear comprehension of the doctrines involved in the leading cases in this important branch of Law.

Leading Cases done into English. By an APPRENTICE OF LINCOLN'S INN. Macmillan. 1876.

Here is a rare treat for the lovers of quaint conceits, who in reading this charming little book will find enjoyment in the varied

metre and graphic language in which the several tales are told no less than in the accurate and pithy rendering of some of our most familiar "Leading Cases." The facility with which the "Apprentice" passes from one style to another, and the terseness with which he fits well-known cases to the framework of his verse, cannot fail to make this dainty volume a welcome companion for the practitioner whose love of culture has not yet been blunted by Court or Chamber-work. There are many such, we are sure, who will thank the "Apprentice of Lincoln's Inn" for singing to them, "in the music of Homer," of the "strife immortal that arose between landlord and tenant, Strife that set high in the heavens a star to illumine in all time Divers kinds and distinctions of chattels annexed to the Freehold," and who will gladly be reminded of the "Six Carpenters" in the gloom of a winter's evening by the picturesque refrain, "The birds on the bough sing loud and sing low."

The Statutes: Revised Edition, Vol. X. Eyre & Spottiswoode. 1876.

The new issue of the Revised Statutes covers about the same extent of time, three years of the present Reign, as its immediate predecessor. The work of the Statute Law Revision Act, 1875, is very marked in the volume before us, which brings down this valuable series to the year 1850.

Self-preparation for the Final Examination. Containing a complete course of study, with Statutes, Cases, and Questions; and intended for the use of those Articled Clerks who read by themselves. By JOHN INDERMAUR, Solicitor. Second Edition. Stevens & Haynes. 1876.

Every articled clerk who has passed the Intermediate Examination would do well to read these fifty pages of sound practical advice and guidance. No candidate of average ability, who fairly works through the course of study here laid down for him by Mr. Indermaur, can well fail to pass the Final Examination. We are glad to see this little work has reached its second edition.

. Owing to the great pressure on our space we have been obliged to postpone several Reviews.—ED.

Books Received.

We have to acknowledge the receipt of the following:—

- Macleod's Theory and Practice of Banking.* Vol. II. Longmans. 1876.
- Foulkes's Smith's Action at Law.* Stevens & Sons. 1876.
- Mears's Ortolan's Roman Law.* Stevens & Sons. 1876.
- Fitzgerald's Ballot Act, 1872.* Stevens & Sons. 1876.
- Bentham's Principles of Morals and Legislation.* Clarendon Press. 1876.
- Hamel's Customs Laws and Tariff Act, 1876.* Butterworths. 1876.
- Saunders's Oke's Magisterial Synopsis.* Twelfth Edition. Butterworths. 1876.
- Fisher's Law of Mortgages and other Securities.* Third Edition. Butterworths. 1876.
- Proceedings of Royal Colonial Institute.* Vol. VII. 1875-6.
- Balfour Browne's Compulsory Purchase by Corporations.* Stevens & Haynes. 1876.
- Nicoll & Flaxman's Parliamentary and Municipal Registration.* Knigh & Co. 1876

We have also received to date:—

- The American Law Review.* Boston: Little, Brown, & Co.
- The Southern Law Review.* St. Louis: G. J. Jones & Co.
- The Albany Law Journal.* Albany, N.Y.
- The Canada Law Journal.* Toronto.
- The New Zealand Jurist.* Dunedin: Reith & Wilkie.
- The Scottish Law Magazine.* Edinburgh: T. & T. Clark.
- The Irish Law Times.* Dublin.
- Revue de Droit International et de Législation Comparée.* (Part II., for 1876). Bruxelles. Bruylants-Christophe.
- Journal de Droit International Privé.* Paris. Marchal and Billard.
- Revue de Législation Française et Étrangère.* Paris. E. Thorin.
- Rivista di Discipline Carceraria.* Rome. Tip: Artero.

THE LAW MAGAZINE AND REVIEW.

No. CCXXIII.—FEBRUARY, 1877.

I.—THE CRIMINAL JURISDICTION OF THE ADMIRALTY OF ENGLAND: THE CASE OF THE *FRANCONIA*.

IT is recorded of a great Italian Jurist of the fifteenth century, who is styled in the epitaph on his monument in St. Anthony's Church at Padua, "the Wonder of his Age" in both branches of the Law (*Utroque jure Stupor*), that he was wont to say when he was a young student, that of other matters and points of Law he could attain to some understanding by his private study and Chamber-disquisitions, but in the point of *jurisdiction* he could understand nothing but what he heard in the schools *Voce Magistri*. There is probably no branch of jurisprudence, to which this apt remark of the Paduan Professor applies more forcibly in the present day, if the Courts of Law be substituted for the Schools of Law, than that branch of International Jurisprudence which is conversant with maritime rights, respecting which several questions of a novel character have recently been raised;* and, more especially one, which involves a conflict of personal and territorial jurisdiction, the settlement of which is beyond the domain of the text-writers,

* *e.g.* The question of the respect due from the Queen's Ships of War to the Law of the Land, if they come within the territorial waters of a foreign State, has lately been discussed in the Report of the Fugitive Slave Commissioners; but, unfortunately, the Commission has not defined the sense, in which the phrase "territorial waters" is to be understood.

and the solution of which by the decision of the highest English Court of Criminal Jurisdiction will only be authoritative for British purposes. The question has arisen by reason of a collision between the German vessel *Franconia* and the British vessel *Strathclyde*, which happened in the open sea within a marine league from the Admiralty Pier at Dover, in consequence of which collision a passenger on board the *Strathclyde* was drowned. The Master of the *Franconia*, having landed at Dover, and having so placed himself personally within the local jurisdiction of an English Court of Criminal Law, has been arrested and tried before an English Jury, and has been found guilty of "homicide by negligence," a crime unknown to the Law of the Sea, but known to the Law of the Land of England; to which latter law, it has been asserted on behalf of the Crown, that all persons are subject, who navigate the High Seas within the distance of a marine league from the English Coast, no matter whether they are navigating under a British or under a foreign flag. This contention on behalf of the Crown involves one or other of two postulates; (1) either that the three-mile zone of open sea which girds the coast of any State, is by the Common Law of Nations a continuation of its territory, and is subject to its jurisdiction as absolutely as the coast itself;* (2), or that the three-mile zone of open sea may be prescribed for, and that in the case of the British Channel England has a prescriptive right of absolute jurisdiction over all persons navigating that Channel within a marine league of her coasts.†

These postulates, although they are both antagonistic to the general principle of Natural Right, that, as the open sea

* We do not wish to understate the claim of the Crown, which was perhaps more extensive, but it would have been sufficient for the purpose of maintaining the legality of the finding of the Jury, if the territorial jurisdiction of the British Crown over the three-mile zone could have been maintained.

† The Admiralty Jurisdiction is a distinct jurisdiction from either of these, and the law, which the Instance Court of Admiralty properly administers between Nations, is the *consuetudo maris*.

is physically incapable of occupation, it is not susceptible of dominion, and, inasmuch as no nation can reduce it into its possession, it is and must ever remain *nullius territorium*, rest upon very different assumptions, and require for their establishment very different proofs. The former, for instance, would require for its establishment the evidence either of a common practice, or of an overt *consensus gentium* as to the general right; the latter, on the other hand, might be proved, by lapse of time, establishing the presumption of the abandonment by other nations of their natural right of free navigation in parts of the British Channel, and the consequent acquisition of dominion over those waters by England, as in the case of land, in virtue of the tacit consent of other nations. Grotius, however, who first associated sovereignty over persons with dominion over territory, in the sense that every nation occupying a vacant country must be taken to acquire not merely a disposing power over all things within it, but likewise an exclusive right of command over all persons within it, did not admit at first that the open sea was in any way susceptible of exclusive dominion on the part of any nation "in virtue of prescriptive right; as in his early work on the "Right of Prize,"* written by him in 1604, in support of the claim of the Dutch to trade in the Eastern Seas, notwithstanding the Portuguese asserted their exclusive right to that trade, he repudiated altogether the application of the principle of prescription to the open sea on three grounds: (1.) On the ground that the Civil Law forbade it; "Quin et ipsa lex civilis præscriptionem hic impedit. Usucapi enim aut præscriptione acquiri prohibentur, quæ in bonis esse non possunt; deinde quæ possideri vel quasi possideri nequeunt, et quorum alienatio prohibita est. Hæc autem omnia de mari et usu maris vere dicuntur."

* *Hugonis Grotii Commentarius de Jure Prædæ*, printed for the first time at the Hague, in 1868, by Martin Nijhoff, from the original MS. The shorter treatise, known as the "*Mare Liberum*," originally published in 1608, is an extract from this work, being a portion of the twelfth Chapter.

(2.) On the ground that a prescriptive right can only be maintained, where a valid title by acquisition may be presumed. (3.) On the ground that the right of navigation on the open sea is a *jus meræ facultatis*, which does not require a continuous exercise to maintain its validity, and, consequently, can neither be lost by any nation from non-user, nor be acquired by any one nation to the exclusion of all others. Grotius, however, in his later Treatise, "De Jure Belli et Pacis," modified his view as to the sea not being susceptible of dominion on the part of a nation in cases, where other nations have acquiesced in its assertion ; but he still maintained that the right to the use of the open sea was a *jus meræ facultatis*, and that something more than non-user on the part of other nations must be shown in order to establish the abandonment of their natural right in the exclusive favour of a single nation. Vattel, the disciple of Wolff, agreed with Grotius in holding that the right of navigation on the high seas belongs to the class of rights of mere ability (*jura meræ facultatis*), which are imprescriptible, and cannot be lost simply from want of use. (B. I, s. 285.) But he holds, at the same time, that the non-usage of a right of navigation may assume the nature of a consent or tacit agreement, and thus become a title in favour of one nation against another. (S. 286). It also seems to have been the opinion of two great masters of jurisprudence, who have adorned the judicial bench in recent times, and who had frequent opportunities to test the soundness of the principles maintained by Grotius and Vattel in their practical application to the actual intercourse of Nations, that in the case of portions of the Sea a Nation may have a peculiar possession of them, so as to exclude other nations from the common use of them. Lord Stowell, for instance, held that portions of the Sea may be prescribed for, and Mr. Justice Story held it to be legally possible, that a Nation might have an exclusive use of a portion of the Sea founded on the acquiescence or tacit consent of other Nations. (*The Fame*, 3 Mason's Reports.

p. 150). But Lord Stowell also held that the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established on the parts of those claiming under it, in the same manner as all other legal demands are to be substantiated by clear and competent evidence. (*The Twee Gebroeders*, Northwold, Ch. Robinson, p. 339). It is unnecessary to add, that precisely as in the case of land, where a title by usucaption or prescription is set up, the continuous possession of the land for a length of time is an indispensable element of title; so, where an exclusive right of dominion over any portion of the open sea is asserted, it is a *conditio sine quâ non* that the party asserting the title should be able to show, that it has exercised the right for a length of time, without interruption and without dispute. What lapse of time is requisite to found a title by prescription as between nations, has not been definitely settled. The Law of Nature suggests no rule on this head, but if the landmarks of possession go back so far that the memory of man runneth not to the contrary, all nations would probably admit under such circumstances the validity of a claim of prescriptive right. "It is further to be noted," writes Grotius, "that since in those places where that Law of Nations (namely, the law which is founded on common consent) is not received, or is abolished, it is not to be inferred from the mere occupation of the land, that the sea is occupied; so also that a mere mental act does not suffice for the occupation of the sea; but there is need of some external act (as the presence of ships), by which the occupation may be understood to take place. And, again, that if the possession, which arose from occupation, be given up by desertion, the sea forthwith returns to a state of nature, that is, to community of use." (*Right of Peace and War*. Whewell's translation, B. ii. ch. iii. s. xi.)

The claims of the kings of England to the lordship of the seas, which wash the English coast, may be traced back

so far that "the memory of man runneth not to the contrary," and if antiquity of title alone were sufficient to make out England's claim of exclusive jurisdiction over all persons navigating the British Channel at the present day, it would not be difficult to shew that England claimed that right at a very early time, and actively maintained it for several centuries against all nations. If the charter, which purports to have been granted by King Edgar, A.D., 964, to Oswald, Bishop of Worcester, could be relied on as authentic, respecting which, however, doubts exist whether it is not a monkish fabrication, King Edgar would appear to have asserted his empire, in the 10th century, over all the kings of all the islands of the ocean, which lie round England. The Charter commences in these words, which, it must be admitted, are somewhat out of place in a document, the object of which was to authorise Oswald, Bishop of Worcester, to expel all the married clergy from their preferments in his diocese and to replace them with monks. "Ego Aedgarus Anglorum Basileus, omniumque regum insularum Oceani quæ Britanniam circumjacent,* cunctarum nationum quæ infra eam includuntur, Imperator et Dominus." It goes on afterwards to say, "Mihi autem concessit propitia divinitas cum Anglorum imperio omnia regna insularum Oceani cum suis ferocissimis regibus usque ad Norwegiam, maximamque partem Hiberniæ cum sua nobilissima civitate Dublinia Anglorum regno subjugare." Passing by this charter and other questionable documents of the Anglo-Saxon period we are apparently in waters better defined when we arrive at the Four Seas of England, which are mentioned in three places in Bracton, *De Legibus Angliæ*, as the "*quatuor maria*," not coupled by him indeed with the name of England, but fully described as the "*quatuor maria Angliæ*" in a *Placitum coram*

* The extract is from Spelman's *Concilia* Tom 1, p. 432. Prynne adopts a different reading, "*Oceanique Britanniam Circumjacentis*." The document is curious, as it extends the claim of the Crown of England as far as Norway.

Rege in the 52nd year of Henry III.* These seas are also distinctly designated as “*les quatre mers d'Angleterre*” in four different places in the *Domus Day* of Gippeswich,† which was drawn up in the 19th year of Edward I., and purports to be a restoration of an earlier *Domesday* of the reign of King John.

What “the four Seas of England” precisely were, may be open to some doubt. According to the common interpretation of the phrase, ‘the four Seas’ were (1.) The South Channel, between England and France. (2.) The St. George’s, or Irish Channel, and the Deucaledonian Sea,‡ washing the West of Scotland. (3.) The Caledonian Sea (4.) The German Ocean, washing the East of Britain. Such is the description of ‘the Four Seas’ which Dr. Arthur Browne has adopted in his chapter on the Law of the Admiralty as a Criminal Court. (Civil Law, 1801, vol. ii. p. 464.) If this interpretation of the phrase, ‘the Four Seas,’ be correct, it would rather seem to have been a geographical expression, and to have simply signified the Seas of England, and such is the view which Selden seems to take of it, as he considers the term, ‘the Four Seas,’ to signify the Seas of England, Ireland, and Wales, and to be “so divided according to the four quarters of the globe.”—(*Mare Clausum*, B. II, ch. xvi.) The phrase, however, is susceptible of another interpretation, if it first came into use in the reign of Henry III., or, at least at some period subsequent to the reign of Henry II., as the *Domus Day* of Ipswich, may, possibly, carry it back to the reign of King

* *Placitorum Abbreviatio Temp. R. 1*, ch. 11., published by the Record Commission. 1811., p. 171.

† Published for the first time in 1873 in the Appendix to the Black Book of the Admiralty. Vol. ii., p. 45, 47, 65.

‡ The term, “Deucaledonian,” seems to have been used in the fifteenth century to describe the Northern Sea, in which were the Orkades and the Shetland Islands, which were given up by King Christian I., of Denmark, after the marriage of his daughter, the Lady Marguerite, to James III., King of Scotland. They were described in the deed of surrender as being in the Deucaledonian Sea.

John. There were four Seas subject to the Lordship of the kings of England after the Duchy of Aquitaine came into the possession of Henry II., as the marriage portion of Eleanor of Guienne, namely, (1.) The North Sea. (2.) The British Channel. (3.) The Irish Sea. (4.) The Sea of Aquitaine; and over each of these Seas the kings of England maintained their Lordship by fleets under separate admirals; for although the early series of Letters Patent of the Admirals, which is preserved in the Record Office, is confined to the Letters Patent of the Admirals of the Northern and Western Seas of England, a very curious record of the exercise of the Jurisdiction of the Admiral of Aquitaine is preserved amongst the *Placita Coram Rege* of the 18th year of Edward II.* The preservation of this Record, which has escaped the researches of Prynne, and of other writers, who have discussed the origin of the Admiral's Jurisdiction, enables us to form a more accurate opinion as to the object for which the Admiral's Office was introduced into England. The earliest mention of an Admiral of England occurs in the twenty-third year of Edward I., when William Leybourne, who had been previously appointed Captain of the Ports and of the Coasts, was also constituted *Admirallus Angliæ*. Before this time, indeed, the kings of England had been accustomed to appoint great officers under the title of *Custodes Maris*, or *Custodes Marinae*, but those officers do not appear to have exercised any other authority than what was strictly military for the defence of the Ports and of the Coasts. The Admiral's Office, on the other hand, was a judicial office, and the record of 18. Edward II. shews that he administered justice in matters of maritime wrong on the high seas, *secundum legem mercatoriam*,†

* *Placitorum Abbreviatio temp. R. 1.*—Edw. II. p. 353.

† The Record is in these words: *Processus placiti tenti 'coram majore Ville Bristoll, virtute brevis Domini Regis ei inde directi anno XVIII Regis nuno per quem compertum est super eo quod magister navis Sancti Dominici de Placentia et alii socii sui monstraverunt domino Regi, quod fretati fuerunt cum vinis adducendis in Flandriam depredati fuerunt super mare per quosdam*

not *secundum consuetudinem terræ*. Hence the disputes become more intelligible between the King and the Parliament in the reign of Richard II., and the frequent conflicts of jurisdiction between the Common Law Courts and the Admiral's Court, the Common Law Courts seeking to enforce the *consuetudo terræ* wherever the sea might be considered to be *intra fauces terræ*; the Admiral's Court, on the other hand, claiming to exercise its jurisdiction over the sea, *secundum legem maritimam*, wherever it flowed up to high water mark. It is unnecessary to refer to the later Patents of the Admirals prior to the reign of Henry IV., to show that the kings of England maintained their Lordship over the Four Seas of the North, of the West, of Ireland, and of Aquitaine by separate fleets under the command of as many Admirals, or under the command of separate Vice-Admirals, the Lieutenants of one High Admiral. One memorable instance will suffice, which is recorded in the Appendix to the Black Book of the Admiralty, vol. i. p. 373, which happened in the thirteenth year of the reign of Henry IV., when Letters Patent were granted to Sir Thomas Beaufort constituting him Admiral of England both for the Northern parts and for the Western parts, Admiral of Ireland, and Admiral of Aquitaine. This Admiralty Jurisdiction, however, is quite distinct from the prescriptive claim of England to the Lordship of the Sea, which culminated in the Treaty of Westminster of 1674, when the Dutch, having previously consented, under the Treaty of Breda of 1667, that their vessels should lower their flag to the kings of England's war-ships, whenever they should meet them on the British Ocean, "eo

malefactores Anglos, Scilicet per homines de Bristoll, super quo Dominus Rex mandavit Johanni Bendin, admirallo flete Regis navium versus partes Aquitanie, quod navem predictam et vasa una cum mercimoniis in eadem, si contingeret ipsam invenire, dicto magistro restitueret. Qui admirallus virtute mandati predicti inquisitionem de premissis per sacramentum marinariorum per quos compertum fuit quod XIII., nominati de Bristoll, felonice depredarunt predictum Petrum Martyn ad valenciam XI. librarum. Quos dictus Rex præcepit a. t. chiari et restitutionem fieri secundum legem mercatoriam, p. 358.

modo, quo id ipsum ab omni tempore olim factum fuerat," agreed that their vessels should pay that mark of honour to the English Jack in the seas extending from the promontory of Van Staten in Norway to Cape Finisterre in Spain. Vattel observes, in regard to this claim of England, "The fleets of England have given room to her kings to claim the Empire of the Seas, which surround that island, even as far as the opposite coasts. Selden relates a solemn act, by which it appears that in the time of Edward I. that Empire was acknowledged by the greatest part of the maritime nations of Europe, and the republic of the United Provinces acknowledged it in some measure by the Treaty of Breda in 1667, at least so far as related to the honour of the flag. But solidly to establish a right to that extent, it were necessary to prove very clearly the express or tacit consent of all the persons concerned. The French have never agreed to this pretension of England, and in that very treaty of Breda Louis XIV. would not even suffer the Channel to be called the English Channel or the British Sea" (Chitty's translation, B. i. § 289).

This claim of England to the Lordship of the Sea, although it acquired latterly an unreasonable development, had not an unreasonable origin. The Lordship of the Sea was originally claimed by States, as a justification of their right to put down piracy, and there is a tradition that King Edgar sent forth a fleet twice a year to scour "the narrow sea" of pirates, and that a custom grew up, founded on this practice of King Edgar, under which the kings of England were, as it was believed, bound to keep the seas adjoining England clear of pirates. Thus in a quaint old law-book, entitled, "The Doctor and Student," compiled about 1518, by Christopher St. Germain, a famous lawyer of the Middle Temple. The Student says, p. 270, "The King, of the old Custom of the Realme, as Lord of the Narrow Sea, is bound, as it is said, to scour the sea of the pirates and petit robbers of the sea, and so it is read of the noble King Saint Edgar, that he

would twice in the year scour the Sea of such pirates, but I mean not thereby that the King is bound to conduct his merchants upon the sea against all outward enemies, but that he is bound only to put away such pirates and petit robbers."

This claim to the Lordship of "the Narrow Sea," which the Student in the above passage asserts for the Kings of England, cannot be traced so far back as their claim to the Lordship of "the Four Seas," unless upon the principle that *omne majus continet in se minus*. Nevertheless the Lordship of "the Narrow Sea," as asserted by the Commons of England in the Reign of Henry V., rested on a more solid pretext of right than the Lordship of "the Four Seas." It rested on a principle of Public Law, which holds good in the present day in respect of the stream of navigable rivers, namely, that the Kings of England, being in physical possession of both shores of the British Channel, were in juridical possession of the waters contained between those shores. Such is the inference to be drawn from the petition presented to the Crown, in 1421, in which the Commons pray, "that in virtue of the fact that by the Grace of God the King's Highness was Lord of the Coasts of both parts of the Sea, he should levy upon all strangers passing along the sea such dues for the advantage of the King's Highness, as should seem to him reasonable for the safeguard of the sea." (Rot. Parliamenti 8. Henr. V. Tom. IV. p. 126.) There is also evidence of the same period, but of a more popular kind, that the Kings of England were at that time accounted to be in possession of "the Narrow Sea." It is to be found in an ancient black-letter poem, which has been preserved by Hakluyt, in his collection of Voyages (Vol. I. p. 107), and which is entitled "The Libel of English Policie, exhorting all England to keepe the Sea, and, namely, the Narrow Sea." The scheme of this poem is to urge the English nation to maintain its supremacy over the British Channel, and it represents the Emperor Sigismund I., who came to

England, in 1416, in the hope of restoring peace between the French and the English Crowns, as addressing to King Henry V. the following counsel :—

“ And to the King thus he sayd: my Brother
 (When he perceived two townes, Caleis and Dover)
 Of all the townes to chuse of one and other
 To keepe the Sea, and soone to come over
 To weere (war) outwards and your regne to recover,
 Keepe these two Townes sure, and your Majestee,
 As your tweyne eyne, so keepe the Narrow Sea.”

The phrase “narrow sea” is used repeatedly throughout this poem, which fills twenty-two folio pages, to signify the Channel between Dover and Calais, but however much the Commons of England may have been desirous to diminish their own war-burdens by levying tolls on strange ships passing along “the narrow sea,” the Crown of England does not appear to have ventured to give effect to their prayer.

This claim on behalf of the Crown of England to exercise absolute dominion over “the narrow sea,” as far as it rested on its possession of both shores, had a well defined beginning, as Calais did not become a possession of the British Crown before A.D. 1347 (21 Ed. III.) It had also a well defined ending, when the Crown of England lost the last of its possessions on the French coast by the surrender of Calais in 1558. On the other hand, if England’s title to such a dominion rested on a prescriptive right, which had a valid origin, and had been acquiesced in by other nations, her title to exercise that dominion would not have been necessarily extinguished by the severance of Calais from its allegiance to the British Crown, any more than the prescriptive right of Denmark to levy tolls on all vessels, passing along the Channel known as the Ore-Sound, ceased on the dissolution of the Union of Calmar, or on the separation of Norway from Denmark in 1814. But England’s title to any such dominion, whether it originated in her possession of both coasts or rested upon a prescription, to the contrary of which

the memory of man runneth not, has long since been forfeited, for its use has been neglected by her for such a length of time as to found a presumption *juris et de jure*, that she has abandoned it. "Celui qui abandonne une chose cesse d'en être le maître, et par conséquent une chose abandonnée devient une chose qui n'est à personne." (Wolff, Droit des Gens, § cciii.) It would seem, however, from a report submitted by Sir Leoline Jenkins, in 1666, to King Charles II., that the Crown of England at that time was desirous to uphold the right of neutral sanctuary in the narrow part of the British Channel, much in the same way as the Baltic Powers have at times been desirous to maintain within the Baltic Sea the right of neutral sanctuary, when the Baltic Powers are not at war.* The question arose upon the capture of a Biscayan ship in the British Channel, by a Portuguese frigate, which had brought her Prize into a British port, whether the British Crown might rightfully divest the captor of his prize on the ground of the capture being made in British waters. "However the truth may be," writes Sir Leoline to the King's Council, "as to the Chambers, 'tis certain the seizure was made in your Majesty's seas. But so it is, that, notwithstanding your Majesty's undoubted right of dominion and protection in these seas, strangers do hold themselves, if not permitted, yet excused for such hostilities, when they are acted at a due distance from your Majesty's ports, harbours, and chambers, grounding themselves upon what was done between Spain and the Netherlands."—(Life of Sir Leoline Jenkins, vol. ii., p. 732). Sir Leoline would appear to refer in the above Report to the proclamation which had been made by King James I. in 1604, during the war between Spain and the Low Provinces, touching his resolution to maintain the right of neutral sanctuary upon the Seas sur-

* Treaty of 28th of June, 1780, between Denmark and Russia. Treaty of 8th May, 1781, between Russia and Prussia. Treaty of 27th March, 1794, between Denmark and Sweden.

rounding England within such limits as were necessary for the safety and welfare of the State, and respecting which Vattel (§ 288) writes in these words:—"During the war between Spain and the United Provinces, James I., King of England, marked out along his coasts certain boundaries, within which he declared that he would not suffer any of the powers at war to pursue their enemies, nor even allow their armed vessels to stop and observe the ships, that should enter or sail out of the ports." Selden* cites this proclamation of the neutrality of the King's Chambers as evidence of the King of England's right to exercise dominion over all persons within the Seas, which surround England, at any distance from the coasts of England; whilst Albericus Gentilis,† in an argument on behalf of a Spanish vessel captured by a Dutch Letter of Marque within one of the King of England's Chambers, treats the edict of James I. as limiting the right of neutral sanctuary to the waters immediately adjacent to the English coasts, and as repudiating all territorial jurisdiction beyond those limits (*ultra fines illos*).

Other claims to dominion over the Sea adjacent to their territory have been set up by other States, for instance by Venice to the Adriatic, by Genoa to the Ligurian Sea, by Denmark to a portion of the North Sea. All these claims rested on prescriptive right, and have been long since abandoned. But another class of claims to dominion over the Sea, more extravagant indeed than any which were grounded on ancient prescription, were set up in comparatively modern times, founded on a pretended *right of occupation* of the Sea, as in the case of the Portuguese, who claimed dominion over the

* Mare Clausum, ch. xxii.

† Hispaniæ Advocatones, L. 1, ch. viii. (De Marino territorio tuendo.) Albericus Gentilis makes the observation, that a great part of the Law of England was in the breasts of the Judges, so that Foreign Powers could not be expected to submit to their conclusions. "Etiam in serinio pectoris nostrorum Judicium esse multum Anglicani juris dicitur, ubi non se patientur concludi externi Reges."

Eastern Ocean in virtue of Vasco de Gama having first discovered and sailed over those Seas in 1497. But as regards this right of occupation, Grotius aptly remarks, "Nimirum apparet in nulla re verius dici posse, quod doctores nostri prodiderunt, mare, cum sit incomprehensibile non minus quam aer, nullius populi bonis potuisse applicari. Si vero ante alios navigasse et viam quodammodo aperuisse, hoc vocant occupare, quid esset magis ridiculum; nam, cum nulla pars sit maris, in quam non aliquis primus ingressus sit, sequetur omnem navigationem ab aliquo esse occupatam. Ita undique excludimur. Quin et illi, qui terrarum orbem circumvecti sunt, totum sibi oceanum acquisivisse dicendi erunt. Sed nemo nescit navem per mare transeuntem non plus juris, quam vestigii, relinquere." (*De Jure Prædæ*, cap. XII., p. 227.) We pass by the Papal Donations of Nicholas V. and of Alexander VI. in favour of Portugal and Spain respectively. England, in the person of her Queen, Elizabeth, refused to acknowledge any title in the Spaniards in virtue of the Papal Donation to exclude either her subjects or those of any other European Prince from the navigation of the Seas of the Western Indies; whilst the exaggerated pretensions of Portugal to exclude the Dutch from the navigation of the Seas of the Eastern Indies provoked that insurrection of public opinion in favour of the Liberty of the High Seas, at the head of which Grotius placed himself. Grotius had indeed been preceded by Balthazar Ayala and Albericus Gentilis as explorers of the way, but he himself led the van of the great intellectual movement, which swept away the ancient traditions of the Imperial Law applicable to the High Seas, and he laid the foundations of a new order of ideas on public law, which, to use the language of the Historian of the Middle Ages,* may be considered to be as nearly original in

* Hallam's History of Literature, Part iii. ch. iv. § 84.

its general platform, as any work of man in an advanced stage of civilization and learning can be.*

The Jurisdiction of the Admiralty, on the other hand, rests upon juridical principles totally distinct from those of territorial sovereignty. It was originally a *personal* jurisdiction. The title of Admiral is probably of Saracenic origin, and was the distinctive appellation of naval commanders of higher grade than the captains of single ships, and who were in fact commanders of squadrons or of fleets of ships.† When the English fleet was assembled at Oleron on occasion of the fourth Crusade against the Saracens, the necessity became evident of establishing laws for the maintenance of discipline on board the vessels, the customs of the land being inapplicable to the incidents of maritime life. Ordinances were accordingly issued by King Richard I. from the Castle of Chinon, for the government of the mariners, and the Captains and Constables of the fleet were invested with special authority by a Royal Writ to enforce those ordinances, as Justiciaries of the King's Fleet. We find no mention, however, in England of any Chief Justiciary of the King's fleet under the title of Admiral before the 22nd year of the reign of Edward I., when Willielmus Leybourne, who had been already appointed to the ancient office of "*Capitaneus Marinariorum*" was further appointed "*Admirallus Angliæ*." This appointment seems to have carried with it a jurisdiction unknown to the Common Law of England, for it was a jurisdiction conducted according to the course of

* The Treatise of Grotius "*De Jure Prædæ*," which was completed by the author at the commencement of 1605, is a remarkable work for a youth of twenty-two years to have composed. The "*Mare Liberum*," which forms the twelfth chapter of this work, was published apart from the body of the work in the month of November, 1608. The Commentarius "*De Jure Prædæ*" became the scaffold of the greater work "*De Jure Belli et Pacis*," which Grotius undertook during his exile at the suggestion of Peirescius and upon the advice of Lord Bacon, and which was published in Paris in 1625.

† In the Customs of the Sea, collected in the *Consolat de la Mar*, ch. clxxv., the admiral of the armed fleet is mentioned in contrast with the captains of single ships. *Black Book of the Admiralty*, vol. iii. p. 351.

the Civil Law. We find legal mention soon after this period of the Admiral in a case, which came, as it seems, before the Justices of Oyer and Terminer, not long after their office had been instituted by the Statute of Westminster the Second (13 Edw. 1, ch. 1).

The fullest report of this case, which is the most ancient of its kind on record, has been preserved in a MS., which was in the possession of Selden, at the time when he wrote his annotations on Lord Chancellor Fortescue's Treatise *De Laudibus Legum Angliæ* (ch. xxxii. p. 31). The case itself arose in 25 Edw. 1., and it was in the nature of a civil remedy, but the *dicta* of the judges seem at first sight to countenance the notion, that the Curia Regis exercised at that time criminal jurisdiction over all vessels on the sea adjoining the coast of England, whereas those *dicta* admit of another interpretation, namely, that they held the criminal law of England to be applicable to British subjects on board of British vessels, notwithstanding such vessels were on the High Seas and beyond the Realm. The case may be thus stated. An action of Replevin was brought by Robert de Bœuf against William Crake, of Holtham, in the county of Norfolk, for seizing his ship off the coast of Scarborough and taking her into Holtham, when the counsel for the defendant objected to the jurisdiction of the Court on two grounds, first, that the seizure of the vessel took place on the sea, where there was no country (pais), from which the Sheriff could summon a jury; and, secondly, that the King had assigned to the Admiral to hear and determine all complaints touching acts done on the sea. The judges overruled both these objections. Bery, Judge, in reply to the first objection said, "We have general power throughout all England, but we know nothing of the power of the Admirals,* of which you speak, nor are we willing to assign to them any of our

* The first mention of the Admiral in our printed Law Books is in *Itin. Cancell. tit. Corone*, 899.

power, except on the King's command, of which you have given no evidence." Upon the defendant's counsel then urging that the act was done at a place where there was no neighbourhood (*visne*), whence a jury could be summoned, Howard, Judge, replied, "there is neighbourhood enough, that if a man kills another there, he shall be taken and brought to land, and there hanged equally as for an act done on the land;" and Metingham, Judge, added, "We say we have as much power to take cognizance of an act done upon sea as upon land." Such language on the part of the King's Judges might seem to imply, that they held the high seas adjoining the Coast of England to be subject to the Common Law of England in criminal matters, equally as the coast itself; but, as the parties to the suit were both British subjects, however conclusive the case may be, that the King's Judges held that a murder committed on board of a British ship on the high seas was cognizable at Common Law before the Admiral's office was instituted, it raises no presumption that they would have claimed jurisdiction in respect of a murder committed on board of a foreign ship in the same part of the high seas. We may refer with great probability to this period (25 Edw. I.) the commencement of the contention between the Courts of the King in Westminster Hall and the Court of the Admiral, the Admiral having under his Letters Patent authority to do all things pertaining of Right and according to the Law Maritime to the office of Admiral, a perilous vagueness of statement, which encouraged the Admiral and his deputies to encroach in civil matters on the franchises of the maritime boroughs and on other local jurisdictions. In consequence of great clamour and complaints arising from these encroachments, it was determined to remedy them by a Statute passed in the 13th Richard II. (St. 1, ch. 5,) under which it was declared that the Admiralty Court was "henceforth not to meddle of anything done within the realm, but only of a thing done upon the sea."

It is necessary here to pause for a moment, inasmuch as this Statute was enacted not so much with a view to restrain the exercise of the criminal jurisdiction of the Admiral, as to check the rapacity of the Admiral's deputies in their conduct of the civil jurisdiction, which formed, in fact, the more lucrative branch of the Admiral's Office.

There had been a law of the Sea in civil matters long before the office of Admiral is mentioned in any Chronicle or Law Book; a law of the Sea, which was founded on the usage of merchants and mariners, a *consuetudo maris*, a *ius non scriptum* in matters of the Sea, which had been administered by other courts before the institution of the Admiral's Office. This common law of the Sea appears at the earliest times, when we have glimpses of it, to have been administered in all civilised countries by tribunals of voluntary jurisdiction, whose decisions were rather arbitrations, and they are occasionally so called, than judgments; but, in course of time, it came to be administered by tribunals armed with coercive jurisdiction under charters, or franchises granted by the Sovereign power. This customary law of the Sea appears to have been administered, in many parts of England, shortly before the institution of the Admiral's office, by the Baillifs of the maritime boroughs, who held their Courts from tide to tide for the benefit of passing mariners. An early record of such a Court is preserved in the Domesday of Ipswich,* and we have traces of the existence of such Courts in other maritime boroughs, the Domesdays of which have unfortunately perished.

After the office of Mayor had in several maritime boroughs replaced that of the Baillifs, the Mayor's Court in such boroughs appears to have administered the Common Law of the Sea to passing mariners, and there is good reason for

* It is provided in the Domesday of Ipswich, drawn up in the second year of King John, that "les pletes attachez à la ley Marine, c'est assaver, pur mariners estraunges passauntz, e pur ceux qe ne attendent forkes leur mareye, seyent pledez de mareye en mareye."—*Black Book of the Admiralty*, vol. ii., p. 22.

believing that the early Judgments of the Sea, which are contained in the Rolls of Oleron, were Judgments of the Court of the Mayor of the Commune of Oleron * delivered to passing mariners. Further, after the office of Admiral had been constituted in England, the Admiral and his deputies appear to have been empowered by Letters Patent of the Crown to administer this common maritime law, and so the Admiralty Court came to exercise an *international* jurisdiction in civil matters, whilst its criminal jurisdiction, resting originally on the High Prerogative of the Crown, remained strictly *national*.† No case is to be found in the Law Books to show, that the Admiralty of England ever exercised criminal jurisdiction in respect of offences committed on the High Seas in other than British ships, and any doubt, which could possibly arise as to the absence of that jurisdiction has been conclusively disposed of by the decision of "the Twelve Judges" in the case of *R. v. Serva* (1 Denison's Crown Cases, p. 104), and in the case of *R. v. Lewis* (1 Dearsley and Bell, Crown Cases, p. 182.) The former of these cases enlisted the feelings of Englishmen against the accused parties even more warmly than the recent case of *R. v. Keyn*. The facts were these:—A Brazilian vessel, named the *Felicidade*, fitted out for the Slave trade, had been captured by H.M. ship of war *Wasp* on the High Seas, off the coast of Africa, in pursuance of treaty-engagements between Brazil and Great Britain for the suppression of the Slave trade. A prize crew having been put on board the *Felicidade*, she was ordered to proceed in chase of another Brazilian vessel, *The Echo*, which she overtook and captured,

* The ancient Customs of the Commune of Oleron have been published for the first time from a MS. in the British Museum, in the Appendix to the Black Book of the Admiralty, vol. ii. p. 255. They were probably compiled in the reign of Edward I., and they contain various maritime judgments between passing mariners delivered in the Mayor's Court at Oleron.

† Piracy is not an exception to this rule, as the pirate has no national character, and is out of the pale of all Law.

when the *Echo* was found to be laden with slaves. Possession of the *Echo* was thereupon taken, and her crew was transferred to the *Felicidade*, an English midshipman with eight men being placed in charge of the latter vessel. The prisoner *Serva*, who had been captain of the *Echo*, rose with twelve other Brazilians upon the English prize crew, and killed them all. The question raised was, whether a Court of Oyer and Terminer in virtue of the criminal jurisdiction of the Admiral as transferred to it by Statute 7 & 8 Vict. ch. 3, had jurisdiction to try the prisoners for an offence committed on board the *Felicidade*. The majority of the judges held, that the Court of Oyer and Terminer had no authority to try a foreigner accused of having committed an offence on board of a foreign vessel not within British waters. Two of the judges so far dissented from the majority, as they thought the *Felicidade* was at the time of the rising against the prize crew in the lawful possession of the Queen's officers, and might be regarded as a ship of Her Majesty, but they agreed with the majority on the general principle of law, that the Court had no jurisdiction in respect of an offence committed on board of a foreign vessel on the High Seas. The Lord Chief Justice of England, in the course of his recent luminous and exhaustive judgment in *R. v. Keyn*, has reviewed *Serva's* case, and holds it to be a conclusive statement of the law of England on the subject of offences committed on board of foreign vessels on the High Seas.

We have already referred to the Statute 13 Richard II, Stat. 1., ch. 5, which was the first statute passed to restrain the authority of the Admiral's Office. It would seem, that it was found to have gone too far in restricting the criminal jurisdiction of his office, and the 15 Richard II., ch. 3, was passed, which, whilst it forbade the Admiral's Court in civil matters to take cognisance of anything arising within the body of counties as well by land as by water, enacted that nevertheless the Admiral might exercise his criminal jurisdiction "in respect of the death of a man or of a mahem done in great ships

being and hovering in the main stream of great rivers only beneath the bridges of the same rivers nigh to the Sea and in none other places of such rivers." Such was the statutory adjustment of the contention between the King's Courts of Oyer and Terminer and the Court of the Admiral, until the 28 Henry VIII., ch. 15, by which the criminal jurisdiction of the Admiral's Office was transferred to special commissioners under the Great Seal, amongst whom was included the Judge of the High Court of Admiralty. This jurisdiction has since been transferred to the Central Criminal Court, by 4 and 5 William IV., and it was under that statute, that the master of the *Franconia* was put upon his trial at the Old Bailey according to the course of the Common Law of England on a charge of manslaughter by negligence.

It is to be observed as regards the criminal jurisdiction which was transferred from the Admiral's Court to Special Commissioners, under 28 H. VIII., c. 15, that there is no restriction imposed by the Statute upon the exercise of that jurisdiction in respect of any part of the High Seas, and as a matter of practice the jurisdiction as transferred by that Statute has been exercised in respect of offences committed on board of British vessels in any part of the High Seas, even in tidal waters flowing within the territory of foreign States. But no such jurisdiction has ever been exercised by those Courts over foreign vessels in any part of the High Seas; and if the maxim, "*de non apparentibus et de non existentibus eadem est ratio*," is to govern such a question, the non-exercise of any such jurisdiction since the Admiral's office has been established, would be conclusive against its existence. There were, however, two other points raised on behalf of the Crown in the case of *R. v. Keyn*, which would have taken the case out of the category of offences committed on board of a foreign ship on the High Seas. It was contended that the act of manslaughter, for which Captain Keyn was arraigned, was committed on board of the British ship; and, as such, came within the purview

of 28 Henry VIII. ch. 15. But the Lord Chief Justice of England, representing the majority of the Court, held that, it being clear that the defendant was not actually on board of the British ship, he could not be said to be by construction of law on board of it, as there was no intention on his part to run down the English ship. "In such a case," the Lord Chief Justice said, where a party is charged with manslaughter from running down another ship by negligence, "there is no intention accompanying the act into its ulterior consequences."* The negligence in running down a ship "may be said to be confined to the improper navigation of the ship occasioning the mischief, and the party guilty of such negligence is neither actually, nor in intention and thus constructively, in the ship, on which the death took place." This principle of law is very important, and, although the Lord Chief Justice admits it to savour of subtlety, yet it suggests a reasonable principle of discrimination, which is directly to the purpose, and meets the subtle argument, which would extend the negligence committed on one ship to another ship, in which it produces its effect. But the Lord Chief Justice also held, that the real question was, whether the defendant at the time when the act was done was within British jurisdiction, and owed obedience to the law of this country, so as to be punishable for an infraction of it.

All these outlying points of the case were of minor importance compared with the main argument of the Crown Counsel, namely that the place where the collision took place, though on the high seas, was British territory by reason of its being within the distance of three miles from the English coast, and that the offence was committed, to use the language of the Lord Chief Justice of the Common

* In the case of *R. v. Combes* (1 Leach, Crown Cases, 388), which was a trial for murder, the intention to kill was presumed against the smuggler, who fired a gun from the shore at a person in the preventive cutter on the sea, and killed him.

Pleas, "within the Realm of England." It is satisfactory to find that although the majority of the Court was very slender, it agreed with the Lord Chief Justice of England in a common *ratio decidendi*, whilst the minority of the Court, although they differed from one another in minor particulars, also agreed in a common *ratio decidendi*. The grounds of their opposite decisions may be briefly stated, in the language of Sir Baliol Brett on the part of the minority, and in the language of the Lord Chief Justice of England on the part of the majority.

After citing a long list of authorities, Sir Baliol Brett, now Lord Justice Brett, makes the following observations:—

"I have done so," he says, (that is, I have cited these authorities) "because it seems to me that the whole question depends entirely upon authority. There is no reason founded on the axiomatic rules of right and wrong, why the three miles should not be considered as a part of the territory of the adjacent country. They may have been so treated by general consent; they might equally well have not been so treated. If they have been so treated by such consent, the authority for the alleged ownership is sufficient. The question is, whether such a general consent has in this case been proved by sufficient evidence. I have cited the assertions of a large number of writers, recognized as able writers on International Law, of different countries and different periods. I have cited assertions of statesmen and opinions of great judges, and the decisions of some judges, and the assertions made on behalf of a great government. As there is no common court of nations and no common legislature, none of these are in the usual sense binding on this Court. As the opinions of the judges are manifestly founded on the opinions of the writers, I think the principal evidence is that of the writers. *I have already said that in my opinion a general consent of recognised writers of different times and different countries to a reasonable proposition is sufficient evidence of a general consent of nations to that proposition. In this case I think there is a general consent of nations to a proposition with regard to the three miles of open sea adjacent to the shore of Sovereign States.* I do not think that such general consent as to a distance of three miles is impeached by showing that there has been a difference as to a claim by some with regard to a greater distance than three miles. The question is, what is the proposition to which

such general consent as to the three miles is given? The dispute is whether, by the consent of all, certain limited rights are given to the adjacent country, such as a right that the waters should be treated as what is called a neutral zone, or whether the water is, by the consent of all, given to the adjacent country as its territory with all rights of territory, it being agreed by such country, with all others, that all shall have a free right of navigation or way over such waters for harmless passage and some other rights. If the first be true, it is impossible, according to the reasoning of Vattel and Chief Justice Marshall, which reasoning, I think, is irresistible, that it can be properly said that the adjacent country has any proprietary right* in the three miles, or any dominion, or any sovereignty, or any sovereign jurisdiction. If the latter be correct, the adjacent country has the three miles as its property, as under its dominion and sovereignty; if so, those three miles are its territorial waters, subject to the right of property, dominion, and sovereignty. These are all the rights, and the same rights, which a nation has or can have over its land-territory; if then such be its rights over the three miles of sea, that sea is as much part of its country or territory as its land."

From the opposite point of view, the Lord Chief Justice of England observes—

"It thus appearing, as it seems to me, that the littoral sea beyond low-water mark did not, as distinguished from the rest of the high seas, originally form part of the territory of the realm, the question again presents itself, when and how did it become so? Can a portion of that, which was before High Sea, have been converted into British territory without any action on the part of the British Government or Legislature, by the mere assertions of writers on public law, or even by the assent of other nations?

"And when in support of this position, or of the theory of the three mile zone in general, the statements of the writers on

* We venture to think, that much of the conflict between the text-writers and the decisions of the English and the American Courts has arisen from the text-writers not discriminating with sufficient care between *usufructuary* right and *proprietary* right, and that from this want of care they have assumed that instances of a nation having the usufruct of the three mile zone either by usage or by treaty furnished evidence of its having the proprietary right over it, the proof of which proprietary right would be necessary to establish its exclusive right of jurisdiction over foreign vessels using it merely for the purposes of navigation.

International Law are relied on; the question may well be asked—Upon what authority are these statements founded? when and in what manner have the nations, who are to be affected by such a rule, as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty, which might be found in saying to which of these conflicting opinions such assent has been given. For even if entire unanimity had existed in respect of the important particulars, to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law, as stated by the publicists, had received the assent of the civilized nations of the world? For writers on International Law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations, who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage—an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law, as well as to that of their own country. *In the absence of proof of assent as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor, in my opinion, would the clearest proof of unanimous consent on the part of other nations be sufficient to authorise the tribunals of this country to apply without an Act of Parliament, what would practically amount to a new law.* In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of Parliamentary legislation in a matter otherwise within the sphere of International Law, but it would be powerless to confer a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.

“And when I am told that all other nations have assented to such an absolute dominion on the part of the littoral State over this portion of the sea as that their ships may be excluded from it, and that without any open legislation or notice to them or their subjects, the latter may be held liable to the local law, I ask, first, what proof is there of any such assent as is here asserted, and

secondly, to what extent has such assent been carried, a question of infinite importance, when, undirected by legislation, we are called upon to apply the law on the strength of such assent. It is said that we are to take the statements of the publicists as conclusive proofs of the assent in question, and much has been said to impress upon us the respect which is due to their authority; and that they are to be looked upon as witnesses of the fact, whose statements, or the foundation on which these statements rest, we are scarcely at liberty to question. I demur altogether to this position. I entertain a profound respect for the opinion of jurists, when dealing with matters of juridical principle and opinion; but we are here dealing with a question not of opinion but of fact; and I must assert my entire liberty to examine the evidence and to see on what foundation these statements are based. The question is one not of theoretical opinion, but of fact, and fortunately the writers, upon whose statements we are called upon to act, have afforded us the means of testing those statements by reference to facts. They refer us to two things, and to these alone, treaties and usage. Let us look a little more closely into both."

The Lord Chief Justice then proceeds to analyse the bearing of treaties on the question in the following terms:—

"First, then, let us see how the matter stands as regards treaties:—It may be asserted without fear of contradiction that the rule that the sea surrounding the coast is to be treated as a part of the adjacent territory, so that the State shall have exclusive dominion over it, and that the law of the latter shall be generally applicable to those passing over it in the ships of other nations, has never been made the subject matter of any treaty, or, as matter of acknowledged right, has formed the basis of any treaty, or has even been the subject of diplomatic discussion. It has been entirely the creation of the writers on International Law. It is true that the writers who have been cited constantly refer to treaties in support of the doctrine they assert. But when the treaties they refer to are looked at, they will be found to relate to two subjects only—the observance of the rights and obligations of neutrality, and the exclusive right of fishing. In fixing the limits to which these rights should extend, nations have so far followed the writers on International Law, as to adopt the principle of the three-miles' range as a convenient distance. There are several treaties by which nations have engaged, in the event of either of them being at war with a third, to treat the sea within three miles of each

other's coasts as neutral territory, within which no warlike operations should be carried on ; instances of which will be found in the various treatises on International Law. Thus, for instance, in the treaties of commerce between Great Britain and France, of September, 1786 ; between France and Russia, of January, 1787 ; between Great Britain and the United States, of October, 1794, each contracting party engages, if at war with any other nation, not to carry on hostilities within cannon-shot of the coast of the other contracting party ; or, if the other should be at war, not to allow its vessels to be captured within the like distance. There are many other treaties of the like tenour, a long list of which is given by Azuni (vol. ii., p. 78) ; and various ordinances and laws have been made by the different States in order to give effect to them.

"Again, nations possessing opposite or neighbouring coasts, bordering on a common sea, have sometimes found it expedient to agree that the subjects of each shall exercise an exclusive right of fishing to a given distance from their own shores, and here also have accepted the three miles as a convenient distance. Such, for instance, are the treaties made between this country and the United States in relation to the fishery off the coast of Newfoundland, and those between this country and France in relation to the fishery on their respective shores ; and local laws have been passed to give effect to these engagements. But in all these treaties this distance is adopted, not as matter of existing right established by the general law of nations, but as matter of mutual concession and convention. Instead of upholding the doctrine contended for, the fact of these treaties having been entered into has rather the opposite tendency : for it is obvious that if the territorial right of a nation bordering on the sea to this portion of the adjacent waters had been established by the common assent of nations, these treaty arrangements would have been wholly superfluous. Each nation would have been bound, independently of treaty engagement, to respect the neutrality of the other in these waters as much as in its inland waters. The foreigner invading the rights of the local fisherman would have been amenable, consistently with International Law, to local legislation prohibiting such infringement, without any stipulation to that effect by treaty.

"For what object, then," continues the Lord Chief Justice, have treaties been resorted to ? Obviously in order to obviate all questions as to concurrent or conflicting rights arising under the Law of Nations. Possibly, after these precedents and all that

has been written on this subject, it may not be too much to say that, independently of treaty, the three-mile belt of sea might at this day be taken as belonging, for these purposes, to the local State. But it is scarcely logical to infer, from such treaties alone, that, because nations have agreed to treat the littoral sea as belonging to the country it adjoins for certain specified objects, they have therefore assented to forego all other rights previously enjoyed in common; and have submitted themselves, even to the extent of the right of navigation on a portion of the high seas and the liability of their subjects therein to the criminal law, to the will of the local Sovereign and the jurisdiction of the local State. Equally illogical is it, as it seems to me, from the adoption of the three-mile distance in these particular instances, to assume, independently of everything else, a recognition, by the common assent of nations, of the principle that the subjects of one State passing in ships within three miles of the coast of another shall be in all respects subject to the law of the latter. It may be that the maritime nations of the world are prepared to acquiesce in the appropriation of the littoral sea; but I cannot think, that these treaties help us much towards arriving at such a conclusion. At all events, the question remains whether judicially we can infer that the nations who have been parties to them, and still further those who have not, have thereby assented to the application of the criminal law of other nations to their subjects on the waters in question, and on the strength of such inference so apply the criminal law of this country. The uncertainty in which we are left, so far as judicial knowledge is concerned, as to the extent of such assent, presents, I think, a very serious obstacle to our assuming the jurisdiction we are called upon to exercise, independently of this, to my mind, still more serious difficulty—that we should be assuming it without legislative warrant. So much for treaties.”

The Lord Chief Justice then proceeds to discuss the matter of Usage—

“Usage,” he says, “as to the application of the general law of the local State to foreigners on the littoral sea, notwithstanding reference to usage is frequently made by the publicists in support of their doctrine, there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its law, otherwise than in respect

of matters connected with the navigation, or with revenue, local fisheries, or neutrality. And it is to these alone that the usage relied on is confined. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offences. It is for the first time in the annals of jurisprudence that a Court is now called upon to apply the criminal law of the country to such a case as the present."

The Lord Chief Baron and the Judge of the High Court of Admiralty were in perfect accord with the Lord Chief Justice of England as to the principle, by which the decision of the case under their consideration ought to be governed. The former, who stated that he had participated in the preparation of the judgment of the Judge of the High Court of Admiralty,* which might therefore be taken to be the judgment of both, added that—

"Inasmuch as it cannot be disputed that the high seas, that is to say, the whole seas of the world below low-water mark, are open to all the world, and that the ships of every nation are free to navigate them, no one nation has the right to exercise criminal jurisdiction over the ships of other nations, or the natives of other nations within such ships navigating the high seas—that is, passing through the high seas (without casting anchor or stopping) between one foreign port and another, unless by treaty or express agreement, or by general and long-continued usage, evidenced by the *actual exercise* of such jurisdiction *acquiesced* in by the nation or nations affected by it. Whereas, not one single instance of the exercise of such a jurisdiction is to be found in the history of the world from the beginning of time." "And it appears to me," he adds, "indisputable, that no authorities of any number of writers upon International Law, even if they were express and uniform (which they are not) to the same effect, can

* The Judge of the High Court of Admiralty referred to a judgment of Lord Stowell in the case of the *Henrick and Maria* (4 Ch. Robinson, p. 54), from which it appears that the *ratio decidendi* adopted by the majority of the judges in the present case was also approved by that eminent judge. "It is to be remembered," Lord Stowell says, "that this (namely, the consummation of the capture of a vessel) is a matter not to be governed by abstract principles alone; the use and practice of Nations has intervened and shifted the matter from its foundations of that species: the expression which Grotius uses on these occasions (*placuit gentibus*) is in my opinion perfectly correct, intimating that there is an *use and practice* of Nations, to which we are now expected to conform."

take away, or impose conditions on the right to free navigation of the high seas by all the nations of the world, or bring the people of all nations within the criminal jurisdiction of England without their assent."

We should not do full justice to the importance of the decision of the majority of the Judges, if we did not notice some observations which fell from Baron Bramwell, now Lord Justice Bramwell, whose printed judgment was read by Baron Pollock.

"I am influenced," he said, "by what the Solicitor-General said we ought not to be influenced by, namely, by the possible consequences of our decision, or rather that which would follow from it, if in favour of the Crown on this point. The right we should claim, we must concede to other countries, and so I admit that whatever laws they thought fit to make, would bind our ships when within three miles of their shores, and as to our own shores in our remotest colonies, that we should be responsible for all that took place within three miles of our coasts, as if it had taken place on land. No doubt if the law is so, we ought to declare it regardless of consequences, but if it is a measuring cast which opinion is right, I think we ought to leave it to the legislature, and not make a law ourselves with imperfect powers. On the ground that no such foundation, as now claimed, has ever been claimed before, I hold that none exists. This may be a very narrow-minded view of the matter; my excuse for it is, that I believe it is right. As to the authorities, there are none which suggest such a criminal jurisdiction as now claimed."

Space will not allow us to discuss at further length this important judgment. We are in the number of those, who hold that the *ratio decidendi* of the majority of the Judges was right, and that the decision itself was wise, although it has been received in several quarters with dissatisfaction. If the majority of the Judges had held that the Admiral of England had criminal jurisdiction over the foreign ship by reason of its being within the three mile zone of open sea adjacent to the coast of England, the jurisdiction so asserted would have been a maimed jurisdiction, totally inadequate to satisfy the demands of justice as regards the navigation of the High Seas, which require that a culpable violation of the

international sailing rules, whereby injury to life or limb has been caused, should be punishable equally, when it happens beyond the three mile zone, as within it. On the other hand, if the majority of the Judges had ruled, that by intendment of law the offence in this case had been committed within the British ship according to the decision in *Combes'* case (1 Leach, C. C., p. 388), and that the master of the German ship was on that account amenable to British Criminal Law, by *parity of reasoning* they would have indirectly decided that, if the master of a British ship should run down a foreign ship on the High Seas beyond the three mile zone, and should drown the foreign crew and passengers on board of her, he would not be amenable to British criminal law, as by intendment of law the offence would have been committed on board of a foreign vessel not within British territory, and therefore not subject to British criminal law, as decided by "the Twelve Judges" in *Serva's* case (1, Denison, C.C., p. 104.) The case of the *Franconia* will be found to be full of thorns, from whatever point of view it is sought to grapple with it judicially, and judge-made law with all its useful fictions has been declared by the judges themselves to be inadequate to remedy the wrong in such a case. In fact the criminal jurisdiction of the Admiral of England, which it has been attempted to apply to it, has been found to be a strictly *national* jurisdiction, which travels everywhere, indeed, on the High Seas with vessels under the British flag, but may not intrude itself into vessels navigating the High Seas under the protection of a foreign flag. It is in this respect unlike the civil jurisdiction of the Admiral, which is born of another parent, the *consuetudo maris*, and is *International*. What is wanting at present is, that as Nations have agreed that a common system of sailing regulations shall be binding internationally upon their vessels whilst navigating the High Seas, they should settle by common agreement the penalties, which should attach to a culpable violation of those regulations, in cases where injury to life and limb

has resulted therefrom, and that the Admiralty jurisdiction in respect of the enforcement of those penalties should by like agreement be declared to be International.

We propose, on a future occasion, to discuss the civil jurisdiction of the Admiralty of England in its application to another phase of the Case of the *Franconia*.

TRAVERS TWISS.

II.—THE LATE MR. JUSTICE ARCHIBALD.

THOMAS DICKSON ARCHIBALD was the sixth son of the Hon. Samuel Archibald, LL.D., who was for many years Speaker of the House of Assembly of Nova Scotia, and subsequently Judge of the Vice-Admiralty Court, and Master of the Rolls, of the same province.

His family, which was of Scotch origin, appears to have been settled in the North of Ireland in the latter part of the seventeenth century, for we find some members of it taking part in the memorable defence of Derry; and about the year 1750 one of his ancestors, afterwards well known in Nova Scotia as Major David Archibald, migrated with his family from the parish of Maghra, in the County of Londonderry, to Londonderry in the State of New Hampshire, whence he removed again in 1760 to Truro in Nova Scotia, not far from the village of Grand Pré, since celebrated in song by Longfellow.

In 1768 this David was the first militia officer appointed for Truro, as well as the first Justice of the Peace for that place; and in the latter capacity his name is still associated with many amusing stories of off-hand justice. He was also one of the earliest representatives of Truro in the General Assembly of the Province.

Samuel Archibald (the father of the subject of this memoir) having lost his father at an early age, was brought up under the care of his grandfather David. After having tried his hand at farming for a short time, finding the occupation not congenial to his taste, he became a student at Andover and Harvard; and in 1805 he was admitted an attorney and barrister of the Supreme Court of Nova Scotia. In 1806 he was elected a Member of the House of Representatives, of which body he afterwards became Speaker. He appears to have been gifted with great eloquence, and to have achieved rapid success in his profession. He was also possessed of an inexhaustible fund of humour; and, if report be true, he contributed not a little to the stock of materials so admirably handled by the late Justice Halliburton in the recorded sayings of the immortal Sam Slick. In 1824, when on a visit to England whilst Speaker of the House, he was offered a seat in the Imperial Parliament by the Marquess of Lansdowne, who was much struck with his powers; but he declined the offer, on the plea that "being already the head of one House of Commons, it would not do for him to become the tail of another." He was unquestionably one of the most popular men ever known in his native Province, where his memory is still cherished with regard and affection.

Thomas Dickson Archibald was born at Truro in 1817, being one of a family of nineteen children. His boyhood was passed amidst the wild and beautiful scenery of the district, which influenced his taste in after life, and the memory of which he cherished till the last, with a constant longing to revisit scenes associated in his mind with his early happy years. He studied for some years at Pictou Presbyterian College, where under the teaching of Dr. McCulloch, a worthy Scotch Professor, he received an admirable grounding in the classics, as well as a good general education. In selecting a profession his first inclination was to be a surgeon, and for some time he studied with that view, and so gained

a knowledge of surgery which was of great practical use to him in after life, especially when he was on the judicial Bench. Finding however that it was not altogether to his taste, he turned his attention to the Law, and was in 1837 admitted an attorney and barrister in the Province of Nova Scotia.

He had some amusing anecdotes to tell of this period of his career, as for instance of consultations by the river side amidst the excitement of fly fishing, and of hours of assiduous waiting in hope of the arrival of a client—only exceeded in anxiety by the fear of exposing his youth and inexperience when the hoped-for client arrived.

In the end of the year 1837, at his father's express request, he undertook a visit to Europe, and sailed accordingly from Halifax in the *Persa*, a brigantine of 80 tons, which was bound for Gibraltar with a cargo of salt fish, in anticipation of the coming Lent. Those were the days before the magnificent steam-ferry of our time had been established; and for forty-eight days the *Persa* was driven about the Atlantic by constant storms; and as she was heavily laden, it became necessary to throw much of the cargo overboard; but the vessel afterwards happening to come upon a dead whale off the coast of Spain, the empty fish-barrels were filled with whale oil, which more than compensated for the loss of the fish. At last Cape Spartel was sighted, and then the magnificent rock of Gibraltar, which left an indelible impression on Mr. Archibald's mind, being the first European land he ever saw. Many of his old friends will recall to mind his pictures of the Rock, which he valued so highly, and especially that one by Melby which long occupied a prominent position in his room on the old library staircase in Tanfield Court.

After travelling for some months in Italy and France, during which time his uniform as an officer of the Halifax Militia stood him in good stead, he reached England in 1838—fully intending, after deriving all the advantages available from his visit, to return to Nova Scotia and follow his profession there.

A different career was however marked out for him—to be traced to circumstances which he always had reason to regard as among the happiest of his life. For having become acquainted with the daughter of Mr. Richard Smith, of the Priory, Dudley, who had been formerly a member of the House of Assembly of Nova Scotia, and was for many years afterwards occupied in developing the mineral resources of Lord Dudley's estates in South Staffordshire, he became engaged to be married, consenting to the condition that he would take up his residence in England.

Accordingly he settled down in London, where he was almost a stranger, and set to work to prepare himself for the practice of the English Law; and with that view he became a member of the Middle Temple on the 11th of November, 1840. Mr. Serjeant Petersdorff (whose pupil he became about this time) says of him:

"His general kindly disposition, his frankness and cordiality secured the regard and friendship of all his associates in my chambers: while as a most assiduous, zealous and persistent pupil, he was invaluable to me. In the latter part of his time he wrote opinions, which I could adopt with confidence. He had a natural aptitude for discovering legal analogies and legal contrasts. He rendered me very special assistance also in the preparation of my 'Common Law Abridgment,' and in other legal literary efforts, in all of which he exhibited an acumen and comprehensive legal knowledge that could not be too highly appreciated.

"Among his fellow-pupils were Sir John Harding, afterwards Queen's Advocate; Bagster, afterwards Attorney-General for New South Wales; James Dawson, who went to Newfoundland; James Hume, who subsequently attained eminence at the Calcutta Bar; and Valentine Lee of the Oxford Circuit, who died when about to be made a Queen's Counsel."

The three years of keeping terms passed, he took out a certificate to practice under the Bar, following a custom much more general in former times than of late,—of beginning business as a special pleader, and working as such for a few years before being called to the Bar. His buoyant spirits and

his contented and cheerful disposition well fitted him for facing the anxieties of this early period of his professional career, as well as the usual responsibilities attaching to a young householder. He continued to practice as a pleader till the year 1852; and it was to the careful study necessitated by that occupation that he always attributed the accurate knowledge of law for which he was afterwards distinguished both at the Bar and on the Bench.

After the passing of the first Common Law Procedure Act, he took an early opportunity, as many other pleaders did, of being called to the Bar, and at first joined the Northern Circuit. After a year's trial however, he changed the Northern for the Home Circuit, of which he continued a member till his promotion to the Bench in 1872. During his practice as a pleader he had done a fair and constantly increasing amount of work, and his clients learnt the advantage of continuing to employ him when at the Bar. His business, which was legitimately acquired, went on growing from year to year, but without any incidents sufficiently remarkable to attract the notice of the outside public. And it may here be said that his career offers a fair example of the success attending on good and honest work, when directed by ability, though without the assistance of any other friends or patrons than those whom a man may himself gain by his own industry and honourable conduct.

Perhaps the first notable cause in which he was engaged was the Shrewsbury case,* where the title to the Alton Towers Estates was in question between the father of the present Earl of Shrewsbury and the representative of the Roman Catholic branch of the Talbots. In that case he was associated with Sir R. Bethell, Serjeant Shee, Mr. C. Hall, and Mr. Badeley,† on the losing side. Sir Richard, who did not enjoy the reputation of being over polite to his juniors,

* 29 L.J. C.P. 34, 190; 6 C.B. (N.S.) 1.

† The list of counsel engaged in this case comprises the following judicial names:—Bethell, Kelly, Rolt, Hannen, Archibald, Charles Hall, and Manisty.

frequently during the progress of the case expressed his respect for Mr. Archibald's accurate knowledge and research ; and Serjeant Shee, well knowing the tendency of his junior's religious views—so opposed to his own—often bantered him with shewing as much zeal for his Roman Catholic client, "as though you yourself were one of us."

He made great way during the next ten years, acquiring the confidence of the great leaders in his profession—as the extent of his business as an arbitrator fully proved—and becoming one of the leading juniors at the Common Law Bar. It is needless to remind the readers of this Magazine that the position of such a junior, though thoroughly appreciated by the seniors who benefit by his learning, as well as by the profession generally, does not offer much scope for public display,—for it is seldom that he gets the chance of conducting any sensational cases. The famous window-light case of *Tapling v. Jones** may however be mentioned here as one where he availed himself of his opportunity, and exhibited in a very satisfactory manner the powers he possessed of arguing lucidly and concisely.

He had previously in the year 1860, at the request of Mr. Bovill, then M.P. for Guildford, drawn the Petition of Right Act (usually called Bovill's Act), which has been since found to be a very satisfactory and useful piece of legislation.

About the same time he declined the Chief Justiceship of Madras, which was offered to him, in a very gratifying manner.

In the spring of 1868, on the promotion of Mr. Hannen to a seat in the Queen's Bench after the death of Justice Shee, Sir John Karslake, who was then Attorney-General, appointed Mr. Archibald the Junior Counsel to the Treasury. The holder of this office, familiarly known as "the Attorney-General's devil," is generally regarded as entitled as of right, after a reasonable period of service, to a seat on the Bench of one of the Superior Courts. And as far as the right depends on precedent, it is undoubtedly supported by the

* 31 L.J.C.P. 342; 34 Ibid. 342; 12 C.B. (N.S.) 826.

cases of Abbott, Richardson, Littledale, Parke, Wightman, and Hannen. The most remarkable exception to the rule during the present century is Welsby.

He continued to hold this onerous and responsible office for four years and a half, under three successive Attorney-Generals, Sir John Karslake, Sir Robert Collier and Sir John Coleridge; and it may safely be asserted that the duties of the office, which entail great anxiety on the holder, were never more satisfactorily or more conscientiously performed by any of his illustrious predecessors. During these years many very important cases came under his preparation and management,—as informations for bribery at elections, and some very special indictments at the Central Criminal Court.

Among the more interesting of his later cases may be mentioned the defence of the Lords of the Treasury against the proposed mandamus to them to pay the costs of prosecutions; * the defence of Mr. Lowe, as Master of the Mint, in the action by Col. Tomline for not coining enough silver money; and last, not least, the preparation of the indictment in the famous Tichborne case.

During the same period his private business caused him to be engaged in many very heavy matters—especially several ecclesiastical cases, comprising the prosecutions of Messrs. Bennett, Mackonochie and Purchas, in the Provincial Court of Canterbury, and of Mr. Voysey in the Provincial Court of York. In the last case he was without a leader in its initial stages; and Sir John Coleridge and Sir Roundell Palmer, who eventually led him when the case was before the Privy Council,† considered his conduct of this complicated case at York a masterly performance.

Of his manner as an advocate in Court in these later years, it is sufficient to say that it was that of a well-bred gentleman, as well as of a highly-educated lawyer. He was always complete master of his case; he spoke clearly and to the point; and, though naturally somewhat nervous, he

* 41 L.J. Q.B. 178.

† 40 L.J. Ecol. 11.

appeared perfectly at his ease, and answered with patience the questions addressed to him from the Bench. In the Mackonochie case,* one of the most distinguished members of the Judicial Committee said to a colleague that he "could not refrain from asking Archibald questions during his argument, he answered them so like a gentleman, and with such a perfect knowledge of the subject."

Once only—in the summer of 1870—an opportunity presented itself to him (in the way of a Commission in a Crown case) of revisiting the scenes of his youth, as well as of spending some days with a brother to whom he was strongly attached, namely Edward Mortimer Archibald, C.B., then as now Consul-General at New York, an officer who has by a long, able, and impartial administration acquired the confidence not only of his own countrymen, but of the Americans themselves also. But on this occasion, as on every other, his sense of duty induced him to give up a pleasant excursion; for he considered that so long as he held his responsible office, he ought not to be so far or so long away from England, even though engaged on business which came to him in virtue of the office itself.

In November 1872, Mr. Justice Hannen having been removed to the Probate and Divorce Court on the resignation of Lord Penzance, Lord Selborne then Lord Chancellor offered Mr. Archibald the vacant seat in the Court of Queen's Bench. The offer was accepted, and Mr. Archibald's promotion was hailed with approval by the profession at large. One or two of his contemporaries, who were at first inclined to question the propriety of the appointment, on the ground of his supposed want of familiarity with their own special lines of business, were soon constrained to admit that they had been mistaken in their estimate of his powers.

Of his career on the Bench, it is hardly possible to speak too highly. From the time when on his first circuit in the spring of 1872, he won the admiration of those Northerners

* 38 L.J. Eccl. 1.

who did not know him before, by his masterly handling of the great Durham poisoning case—to the very last day on which he sat at the Central Criminal Court in August 1876, his conduct on the Bench left nothing to be desired. At *nisi prius* he was courteous and considerate to every one, but firm withal and decided: while in *banc* he invariably made his presence felt, and his light was by no means dimmed even in the radiance of the greater luminaries among his seniors. A good illustration of this is afforded by his judgment in the Exchequer Chamber, in the case of *Riche v. The Ashbury Carriage Company*, where his opinion differed from that of Blackburn, J., and was eventually upheld by the House of Lords.*

Of his merits as a criminal judge, a striking instance was afforded in the trial of Macdonald and the other American forgers, in August 1873.

He was one of the fourteen Judges before whom the *Franconia* case was argued; and the Lord Chief Justice of England, in his Judgment in that case, paid the following high tribute to his merits:—

“In the conflict of opinion which unfortunately exists, it is a great satisfaction to me to be able to add that the late Mr. Justice Archibald, whose loss the whole profession, and especially those who had the advantage of his intimacy or acquaintance, must deeply lament, and whose loss as a most learned, enlightened, and conscientious Judge the public has so much reason to deplore, having seen my proposed Judgment, communicated to me his entire concurrence, both in the conclusion at which I had arrived, and the grounds on which it is founded.”

In addition to his ordinary judicial work, it may be mentioned, as shewing the estimation in which he was held by the chiefs of the Government Departments generally, that he was from time to time requested to serve on Royal and other Commissions, where his ability, knowledge, and experience were of very great service; *ex. gr.*, the Commission for regulating the legal business under various Govern-

* 44 L.J., Exch. 185.

ment Departments, the Slave Circular Commission, and the Commission for inquiring into certain unreformed Municipal Corporations.

In the spring of 1875, on the death of Sir George Honyman, he was transferred from the Queen's Bench to the Common Pleas, where he found himself by the side of one who when Attorney-General had special opportunities of becoming acquainted with his merits.

In the following November he was in due course appointed one of the Election Judges for the ensuing year, and had some right to expect a term of comparative rest, which he much wanted; for his previous hard work, including several very heavy assizes in the North, in one alone of which he tried fourteen prisoners for murder, had begun to tell upon his health. His sense of duty however prevented him from availing himself to the full of his privilege as Election Judge; and during the next eight months he worked as hard as usual, taking a very large share of the business at Judges' Chambers. Many of his friends were struck in August last by his worn appearance, but were fain to hope that his projected trip on the Continent would restore him to health by the end of the Vacation. But, alas! it was not so to be. He returned to England in the middle of September far from well, and his medical advisers discovered the existence of serious disease, which they told him must necessitate a lengthened period of rest. While he was as yet hardly determined on the proper course to pursue in consequence of this intimation, the disease took a fresh turn, and developed itself with such remarkable rapidity that he died on the morning of Wednesday, the 18th of October, almost before any one out of his own immediate family circle knew he was ill.

Though the readers of this Magazine are principally concerned with Justice Archibald as a lawyer and judge, the present Memoir would indeed be imperfect if it made no allusion to his private life and character. He was a man of

simple, real, and unaffected piety ; shewing himself to be no legal monk, but a large-hearted Christian man of the world. An unostentatious but deep-seated religion gave a character to every act of his life. This was the source of numberless deeds of kindness and generosity, unknown to any but the recipients. This it was, too, that bore him up in the heavy affliction he experienced in 1865, when his eldest son, a most amiable and promising young man, was unexpectedly carried off by fever at Oxford, just after being elected a Fellow of St. John's College. And though perhaps a small matter to notice, it was a real religious feeling that suggested the motto "*Deo duce, non fortunâ*," which he selected when, according to ancient custom, he gave rings on being made a Serjeant. And above all it was religion that made all the surroundings of his death such as might be expected after so blameless a life.

Next to his religion, his reverence for his father's memory was with him a most powerful motive for good. He felt the full force of the maxim *noblesse oblige* in its proper sense, and seemed never to tire speaking of his father—telling how, by a life of duty well performed, he had won the affection of his countrymen. It would be superfluous, however, to attempt further to describe the character of this lamented Judge, after it has been already portrayed to perfection by one who has himself so well sustained the eminence of an honourable name. Lord Coleridge has said of him :—

"I really believe there was no man who was more beloved by all who knew him, and I am sure there was no man who better deserved the affection he received. His great powers of mind, his learning, his judgment, tempered by gentleness which was never weakness, made him indeed at once a great Judge and a most attractive man. I believe that a more stainless character than his was never borne by any man who ever sat upon the English Bench. No one was fitter than he to be called from the great task of judging others to be judged himself. I have been told, in words I am glad to make my own, that every gentleman in the profession felt that in him he had lost a friend ; and if he has left us in regret, he has left us also a beautiful example. I

hope I may say that we ourselves in this regret may feel towards him as we know, from the words of the great old Roman, the Germans felt in the times of sorrow—'Lamenta ac lacrimas cito, dolorem et tristitiam tarde ponunt. Fœminis lugere honestum est, viris meminisse.' " *

This noble and affecting tribute to his memory from his Chief is felt by all Justice Archibald's friends to have been fully deserved. They know the words of Lord Coleridge to be as true as they are touching: they know that the *man* as well as the *judge* was emphatically good in every meaning of the word; they know too that he, if any one, was prepared for the great change that came so suddenly upon him; and they may well say of their loved and lost friend—as one of our best and wisest said of his:—

Desiderandus quidem, sed haud lugendus: quippe talium est regnum Dei.

H. C.

III.—DISCOVERY UNDER THE JUDICATURE ACTS.

TWO recent decisions of the Court of Appeal carry the fusion of Law and Equity in the direction of compulsory discovery to an extent which seems startling to a Common Law mind. Disclosure has been ordered of particulars obtained by an agent abroad of one of the parties for the purpose of consultation thereon with such party's Solicitor. (See *Anderson v. The Bank of British Columbia*, 45 L.J. Ch. 449; *Bustros v. White*, 45 L.J. Q.B. 642). But it is a result which is worth consideration, as it has not been arrived at without much deliberation, and the order asked

* See the *Times*, 3rd November, 1876.

for had been previously refused by a Judge at Chambers, and afterwards by the Divisional Court of Appeal, consisting of the Chief Justices of the Queen's Bench and Common Pleas divisions, and the late Mr. Justice Quain.

In considering this result, it is impossible to avoid reflecting that it is the solution of a most persistent objection which has been felt for centuries by the Courts of Law to a principle of Equity, which has at length, under the provisions of the Judicature Act, been naturalized, so to speak, for the joint benefit of the now united Courts of Law and Equity, viz., the principle of enabling a Plaintiff to avail himself, for the establishment of his rights, of information and evidence in the exclusive possession of the Defendant. This principle naturally and inevitably followed the recognition in the Court of Chancery of Trusts, which Courts of Law at first refused to recognise. They also disregarded the right of discovery from the Defendant in aid of the Plaintiff's case, and left the latter to succeed or fail according to his ability to establish his case by his own means.

In the same way that the Court of Chancery established the doctrine of trusts because the Courts of Law refused to recognise them, the jurisdiction of the Court of Chancery to grant discovery arose only because the Courts of Law refused altogether to entertain it. No doubt in this they were acting according to the genius of the Common Law, and recognising their duty as its administrators to protect the weak: a principle upon which is founded the merciful rule that an accused person shall be deemed innocent until he is proved to be guilty, and a witness is held excused from answering any questions which may tend to criminate himself. At first sight, it does seem hard that a litigant should have the right of invoking the Court to assist him in venturing into the enemy's camp in search of materials wherewith to attack him; and the Court of Chancery itself gave weight to this consideration in certain instances, such as when it allowed the right of a mortgagee to refuse

discovery, Lord Kenyon, who, it will be recollected, was educated in the Common Law Courts, advising him to sit upon his box of deeds until he received his money. Carried out to its fullest extent, this principle produces in France and other Continental States those exhibitions, so distasteful to English sentiments of justice, of cross-examination of an accused person, which it is to be hoped will never be witnessed in this country.

Civil actions, however, differ from criminal proceedings in this—that they generally involve an affirmative issue, and are not satisfied by answering negatively the question whether or not the Defendant is guilty of a wrong, but are required also to demonstrate whether the Plaintiff is or not entitled to assert against him a right. In the pursuit of such enquiries, it was often manifestly so detrimental to the rights of the Plaintiff to have to proceed without having the testimony of the only person who was cognizant of the facts on which his rights depended, that the Court of Chancery, early in our history, assumed the jurisdiction of compelling its disclosure ; and the Courts of Law recognised the benefit of this practice, and adopted it to some extent, though the Judges were very chary of exercising it in their Courts. Lord Mansfield, indeed, was so strongly inclined to do so, that he said in one case that wherever a Court of Equity would compel discovery, he would ; and Mr. Justice Buller once stopped proceedings in an action until the Plaintiff complied with the Defendant's application, that he should afford him certain information known only to himself. But it was soon discovered that Lord Mansfield was promising more than he could perform, and the remedy devised by Mr. Justice Buller was found to be incapable of being practically applied as a general rule, available in all cases. The application for discovery from the opposite party remained one for the exercise of the discretion of the Court, which was used with reluctance, only in very clear cases, and on proof of the existence of the evidence sought for in the possession of the

other side, and explanation of the absence of it from the evidence in the possession of the applicant.

Endeavours have been made at various times to clothe the Common Law Courts with a jurisdiction to enforce discovery. The first attempt of the Legislature to counteract the strictness of these Courts in the pursuit of truth, was the 3 & 4 Wm. IV., c. 42, s. 26, by which witnesses who were in the same position as the parties to an action, and for whom the Verdict would be available as evidence, were allowed to give evidence with the proviso that the Verdict should not be admissible for or against them, or any person claiming under them; a proviso afterwards removed by the 6 & 7 Vic. c. 85; which Statute, however, provided that the parties to the Suit, and the husbands and wives of parties, should still be inadmissible as witnesses. This exception was repealed as to the parties to Suits by the 14 & 15 Vic. c. 99, s. 1, in all except criminal cases (s. 3); but it was still decided shortly after the passing of this Act, that the husbands and wives of parties continued incapacitated from giving Evidence, unless they also were parties on the records (*Burbat v. Allen*, 7 Exch. 609, 21 L.J. Exch. 155; *Stapleton v. Croft*, 18 Q.B. 367, 21 L.J. Q.B. 247). The 16 & 17 Vic. c. 83, s. 1, finally removed this disability except in criminal proceedings, and in proceedings instituted in consequence of adultery (s. 2), and except as to communications made during marriage (s. 3); and the 32 & 33 Vic. c. 68, s. 1, removes the exception of proceedings in consequence of adultery. So that, at length, the power of obtaining discovery from the parties and their husbands and wives at the trial of a cause, was established by Statute to the fullest extent, and has worked, on the whole, with satisfactory results.

In the meantime, with the object of rendering discovery available before trial, the Common Law Procedure Act, 1851, had provided that parties should be compellable to allow the opposite party to inspect and take copies of all

documents in their possession relating to an action in all cases in which discovery might have been obtained in Equity (14 & 15 Vic. c. 99, s. 6). In carrying out this provision, the Courts held that it did not entitle them to compel discovery, but only inspection (*Hunt v. Hewitt*, 21 L.J. Exch. 210), thus rendering the Act of no avail, except in those comparatively few cases where a party is able to prove that his opponent is in possession of documents likely to aid him; and when he can do that, he seldom wants more than the right of calling for them at the trial, which he always had. To all the numerous cases in which parties are in the dark, and, therefore, unable to enforce or defend their rights, this Act became inapplicable.

By the Common Law Procedure Act, 1854 (17 and 18 Vic., c. 125, s. 50), it was provided that upon affidavit of either party of his belief that any document, to the production of which he is entitled, is in the possession of the opposite party, such party may be ordered to state on affidavit what documents he has, and whether he has any and what grounds for refusing to produce them. By s. 51 of the same Statute the power of ordering interrogatories was also given upon any matter as to which discovery may be sought, but it was provided that the order was not to be made without affidavit that the applicant was likely to derive material benefit from the desired discovery, so that all the discovery provided by this Statute was confined to cases in which the applicant was in a condition to prove that the opposite party was in possession of the information sought for, and did not entitle him to discover the existence of information or evidence previously unknown to him. On the other hand it was held that the right to deliver interrogatories under this Statute was not limited to cases in which discovery could be obtained in Equity (*Martin v. Hemming* 24 L.J., E. 3; *Osborne v. London Dock Co.*, Ib. 140). "The practice created by this Act," said Alderson B., in *Osborne v. London Dock Co.*, "is an improvement upon that of Equity relating to discovery."

It is, however, difficult to perceive in what this improvement consisted, for in all the cases which have been reported upon this Statute, the Court seems to have acted upon the objections which have been entertained by Courts of Equity, and to have besides required evidence by the applicant of the materiality of the document in question as a condition to the exercise of the jurisdiction. This proof involves antecedent knowledge of the existence of such document, and therefore precludes its discovery through the machinery of the Court by a Plaintiff who is in ignorance of it. In such cases discovery was available only in Equity, as before the Act passed. In Equity the Plaintiff was not required to produce any evidence as a condition precedent to his right to discovery. He had but to state his own view of his case in his bill, which was not on oath, and unless the Defendant could shew on demurrer to the bill, or state on oath in his answer, reasons for disentitling the Plaintiff to the required discovery, he was compelled to give it. The only reasons which the Court of Chancery allowed to be sufficient to absolve the Defendant from such discovery were where there is anything in the situation of the Defendant which renders it improper for a Court of Equity to compel discovery, either because the discovery may subject the Defendant to pains or penalties, or because it may subject him to some forfeiture or something in the nature of a forfeiture. A Defendant may also demur to any part of the discovery sought by a bill which is immaterial to the relief prayed; he may likewise protect himself by demurrer from a disclosure of matters which are the subject of professional confidence, or which may lead to a disclosure of his own title in cases where there is not sufficient privity between him and the Plaintiff to warrant the latter in requiring a disclosure of it (see Daniel's Ch. Pr. 517). The Defendant might also make the same objections to discovery in his answer (Ib. 682).

In arriving at this result the Court of Chancery had been led to investigate the principles on which discovery should

be compelled, in numerous cases in which the natural tendency of mankind to avoid giving assistance to an adversary had exhausted all the arts of ingenuity in raising objections and difficulties to defeat the efforts of Plaintiffs to obtain discovery; and it may safely be said that in no branch of practice has more ingenuity been disclosed than in those cases in which Defendants have attempted to support demurrers and exceptions to answers objecting to discovery. These repeated contests also shewed that in point of practice the right of a Plaintiff to discovery was really dependent on a right to be raised by the Defendant;—that is to say that the Plaintiff was *prima facie* entitled to it in all cases, and accordingly in the Chancery Improvement Act (15 and 16 Vic., c. 86, s. 18), the necessity for a bill by a Plaintiff stating a case for discovery was abolished, and in every case a Plaintiff was enabled to call upon a Defendant to state on affidavit what documents he had in his possession relating to the matters in question between the parties, and what, if any, objections he had to producing them for the inspection of the Plaintiff, and the Defendant had the same right as against the Plaintiff.

This Statute (the Chancery Improvement Act) was passed two years before the Common Law Procedure Act, 1854, above referred to, and it was evidently the intention of the Legislature to introduce into the Common Law Courts by the latter Statute the same facilities for obtaining discovery which a long course of study and discussion in sharply contested cases had established for the benefit of the Suitors in the Court of Chancery. The observation of Alderson B., in the case of *Osborne v. London Dock Co.* (ub. sup.), that the practice created by this Act was an improvement upon that of Equity, shews that it was thus understood at first by the Common Law Judges; but an examination of the decisions which have taken place under it seems to shew that it has not had the results anticipated. In the case in which Mr. Baron Alderson made this observation, which seems to

be an advanced illustration of the exercise of compulsory discovery in a Common Law Court, the Defendant was allowed to deliver interrogatories, 159 in number, the object of which was to show out of the Plaintiff's own mouth that the Plaintiff, who was suing Defendants for wine lost in their docks, had used fraudulent practices with regard to the wines, and that wines of other persons had been fraudulently substituted for those delivered to the Defendants, and that the Plaintiff was privy to the fraud. In *Goodman v. Holroyd* (15 C.B. 839) interrogatories were allowed for the purpose of showing that the deed relied on by Defendant was executed by fraud; a *prima facie* case shewing that fact having been established on affidavit by the Plaintiff. Thus also interrogatories have been allowed as to the representations made by Defendant on the sale of a business in an action for damages, on the ground that the Plaintiff had been deceived (*Blight v. Goodliffe*, 18 C.B. 757); and in *The Derby Commercial Bank v. Lumsden* (39 L.J. C.P. 72), interrogatories were allowed, as to the circumstances under which Plaintiff's title to goods sued for accrued, in support of a defence of fraud; but it was shewn to the satisfaction of the Court "that a fraud must have been committed by some one on the Defendants' side," and the interrogatories were allowed in order to help them "to establish that defence." In *Finney v. Forward* (35 L.J. E. 42) no such case being made in support of similar interrogatories they were not allowed. .

In all these cases of fraud Equity would undoubtedly grant discovery from the Defendant in aid of a Plaintiff seeking to establish his case without any evidence by him.

On the other hand, a well-known principle on which Courts of Equity have invariably refused such aid, is that the Defendant cannot be made to discover his case, and his assertion that the desired discovery related exclusively to that, has been allowed to be a bar to the relief sought. The rule is stated by Lord Redesdale and Mr. Wigram in the following terms:—"It is a rule of the Court of Chancery

that where the title of the Defendant is not in privity, but inconsistent with the title made by the Plaintiff, the Defendant is not bound to discover the title under which he claims" (Ld. Red. 191); but the right of the Plaintiff to the Defendant's oath is limited to a discovery of such material facts as relate to the Plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the Defendant's case is to be established, or to any discovery of the Defendant's evidence (see Wigram on Discovery, 90).

The Courts of Common Law have, however, gone very far in granting such discovery in actions of ejectment. Thus, in *Hilcroft v. Fletcher* (25 L.J. Ex. 94), it was held that interrogatories might be delivered by a Defendant extending to discovery of the Plaintiff's pedigree, and to the manner in which he intended to support it. The interrogatories in this case could scarcely have been answered without disclosing the Evidence on which the Plaintiff intended to rely in support of his case, and, if so, they would clearly go beyond the limit of the rule acted on in Equity; and it is not, therefore, surprising that this case has not been carried further in subsequent cases (See *Stoate v. Rew*, 32 L.J. C.P. 160; *Pearson v. Turner*, 33 L.J. C.P. 224, in which such interrogatories were disallowed, on the ground of the insufficiency of the affidavit on which the applications were founded, which was the usual statutory affidavit). In the case of *Waller v. Forrest* (41 L.J. Q.B. 96), similar interrogatories were disallowed on special affidavits proving the Defendant's case; and it was expressly stated that *Hilcroft v. Fletcher* (*ubi supra*), "had been considerably doubted." The proposed interrogatories were disallowed, on the ground that they proposed "to inquire into the *primâ facie* title of the Plaintiff for the purpose of enabling the Defendant to find a flaw;" and it was said that "where a man having been in possession, a stranger comes to dispossess him, the Defendant may call for some general information as to the nature of the title

which is to be made against him." And, accordingly, in the case of *Towser v. Cocks* (43 L.J. E. 41), interrogatories confined to discovery of the nature of the Plaintiff's title, and the character of it, and not including the means by which he proposed to establish it, were allowed on the usual affidavit.

In other cases than those relating to title in ejectment, the disposition of the Courts of Common Law to compel one party to aid the other in support of his own case, where the existence in his possession of materials applicable to such a purpose can be *prima facie* shown, is exemplified by the case of *Thot v. Leaske* (24 L.J. 142), in which a Plaintiff who was suing defendant for money paid to him as Plaintiff's broker, and, to support his action, had to make out that the Defendant had no authority to act as broker, was allowed to deliver interrogatories for the purpose of discovering whether the Defendant entered into a contract as agent or principal, and if as agent for whom and by what authority, and what books he had containing entries relating to the transaction in question. In more recent cases these decisions have been fully upheld, and interrogatories have been allowed for discovery of particulars of Defendant's infringement of a Plaintiff's patent (*Tilley v. Easton*, 25 L.J. C.P. 293; *Jones v. Platt*, 31 L.J. 365); of damages sustained (*Zarifi v. Thornton*, 26 L.J.E. 214; *Wright v. Goodlake*, 34 L.J.E., 82); and of a libel written by Defendant (*Hill v. Campbell*, 44 L.J.C.P. 97); and generally that any questions which may be asked of the Defendant in the witness-box may be the subject of previous interrogatories (*Zychlinski v. Maltby*, 10 C.B. 838).

The Courts have, however, carefully avoided in such cases going beyond the rule acted on in Courts of Equity that matters relating exclusively to the Defendant's case cannot be inquired into by the Plaintiff; they must be common to both cases at least (see *Zarifi v. Thornton*, ub. sup., *Moor v. Roberts*, 26 L.J. C.P. 246). The fact that the answers to interrogatories considered in other respects allowable would disclose the Defendant's case has been held in some cases

to be no reason for not allowing such interrogatories (see *Whately v. Crawford*, 25 L.J. Q.B., 163; *Carew v. Davies*, ib., 165; *Bayley v. Griffiths*, 31 L.J.E., 477); but in these cases, and in cases relating to the right of resisting the discovery of incriminating matters, the interrogatories have been allowed without prejudice to the respondent's right to object in his answers to the required discovery, and therefore only amount to an assertion of the right of the interrogating party to the respondent's oath on the subject and not to his right to such discovery.

In reference to discovery of incriminating matters the Common Law Courts have certainly far exceeded the limits within which a Court of Equity would hold itself confined. There can be no question that a bill in Equity would have been demurrable if the facts required to be disclosed under it might subject the party disclosing them to penal consequences (see Story on Eq. Jurisp., s. 1494); this principle was acted on and approved by Sir John Leach in *Thorpe v. Macaulay* (5 Mad. 229), Lord Eldon in *Cartwright v. Green* (8 Ves. 465), and Lord Langdale, in *Glyn v. Houston* (1 Keen 329). The Courts of Law have also recognised the rule that a respondent cannot be compelled to criminate himself by answer or document, but in many cases they have allowed the interrogatories leading to such a result and required the respondent to take the objection on oath in his answers to them. In *Whately v. Crawford* (25 L.J. Q.B., 165), *Tupling v. Ward* (30 L.J.E., 222), *Stern v. Sevastopolo* (32 L.J. C.P., 260), and *Pye v. Butterfield* (34 L.J., Q.B., 17) the Court refused to allow the interrogatories to be put on this ground, Martin B. saying "we think that in cases of this kind it would be unfair to submit questions which a party is clearly not bound to answer;" but in *Osborne v. London Dock Co.* (24 L.J.E., 140); *Boyle v. Wiseman* (Ib. 160); *Collins v. Yates* (27 L.J. Ex. 150); *Bartlett v. Lewis* (31 L.J. C.P. 230); *Atkinson v. Fosbrooke* (35 L.J. Q.B. 182); *McFadyen v. Mayor of Liverpool* (37 L.J.E., 193), such

interrogatories were allowed. "The Respondent ought to be put on his oath," says Parke, B., in the first of these cases, "and when he finds any question pinch him he must object to it." And Earle, C.J., in the fourth case, says, "it is clear that every one of the questions might be put to the party in the witness-box, and if he then chooses to swear that his answers will render him liable to be criminally proceeded against, he may protect himself from the dilemma by declining to answer." And Willes, J., in the same case, says that "even admitting the interrogatories are put for the purpose of extracting answers which may criminate the party, or of prejudicing him in the eyes of the jury if he declines to answer them, they ought to be allowed."

There are three recent cases in the Common Pleas which illustrate very forcibly the way in which this rule, which could not arise in Equity, operated at law. In *Edmunds v. Greenwood* (38 L.J. C.P. 45); *Villesboisnet v. Tobin* (ib. 146), the Court of Appeal was called on to decide whether they should reverse an order refusing to allow such interrogatories, and in *Inman v. Jenkins* (39 L.J. C.P. 258), the order in question before the same Court allowed the interrogatories. In each of these cases the Court of Appeal declined to interfere with the discretion of the Judge who had made the order appealed from, on the ground that it was a matter for the discretion of the Judge. Montague Smith, J., in the second of these cases, says that "when interrogatories are *bonâ fide* put for the purpose of discovery, and are relevant to the matter in issue, they may be allowed though the answers to them may tend to criminate the party answering, but that such interrogatories should not be allowed on the ordinary affidavit, but special circumstances must be proved constituting a stronger case than is requisite in ordinary cases." Keating, J., in the same case, gives a clue to the sort of case which would be thought special, saying that "if there is anything giving colour to the supposition that the interrogatories are put for the purpose of a criminal prosecution,

and not merely *bonâ fide* in aid of the civil action, they ought not to be allowed." In the first case, Bovill, C.J., says, "the cases in which such interrogatories have been allowed are in cases of malicious prosecution," citing *Zychlinski v. Markby* (10 C.B. 838), and *Stewart v. Smith* (2 Notes of Cases); and, in cases of fraud (*Bartlett v. Lewis*, 31 L.J. C.P. 230, and *Osborn v. London Docks Company*, 24 L.J. E. 140); that the cases of disallowance are cases of Libel and Slander, and that *Stern v. Stevastopulo* (*ubi supra*) is the only case in which they had been allowed in such an action; and, in the third case, which was an action of libel in which the publication was admitted, and the question was the truth of it, he held that an interrogatory as to whether Defendant published the libel should be allowed.

The case of *Hill v. Campbell* and wife (44 L.J. C.P. 97), which was an action of libel by a servant against his late mistress on a letter giving his character, is an authority for saying that discovery of such a letter might be had on interrogatories under the 51st Section of the Common Law Procedure Act. The special circumstances in that case were described by Brett, J., as being "that the letter had been acted on *prima facie*, as if it contained matter defamatory of the Plaintiff, that it was in possession of Defendants, and that Plaintiff could not obtain evidence of its contents except from them, (as to which, see *Bird v. Malgey* 1 C.B. N.S. 308). And in the case of *Greenfield v. Reay* (44 L.J. Q.B. 81), the Court of Queen's Bench held that such an interrogatory was allowable in an action for libel contained in a printed handbill, as there was no printer's name to it, and the Defendant was seen in company of the man who distributed the bills, and fixing up one of them.

This case of *Hill v. Campbell* (*ub. sup.*) illustrates an important distinction which has arisen, under the Acts by which the Legislature has endeavoured to enlarge the powers of the Common Law Courts for enforcing discovery, between discovery and inspection. "The 14 & 15 Vic. c. 99, s. 6,"

says Lord Coleridge in this case, "gave the Courts power to order inspection in certain cases, limiting those cases by the practice of the Courts of Equity. Between the date of that Statute and the Common Law Procedure Act, 1854, there was wanting the power of discovery to aid that of inspection. The Common Law Procedure Act, 1854, s. 50, gave that power, and also gave an additional power to the Court, namely, upon the affidavit of the party, whether Plaintiff or Defendant, answering the order for discovery, to make such further order thereon as should be just." The 51st Section gives the power of ordering interrogatories, and the judicial interpretation of the above Statutes has been influenced, as Lord Coleridge observes, by "an endeavour to limit the later Statute by the earlier one, and to contend that as the word "discovery" was used in the latter, its apparently larger powers must be confined to the lesser powers given by the earlier one; and, in spite of occasional expressions to the contrary, a series of cases has decided that under the Common Law Procedure Act of 1854, the power and discretion of the Courts (in compelling discovery) are greater and wider than those entrusted to them under the 14 & 15 Vic. c. 99, s. 6, which authorises the Court to order inspection according to whether a Court of Equity would or would not grant discovery."

The view which the Courts of Law have taken of their powers of granting inspection of documents may be gathered from the following cases :—"First, then, the Common Law Courts have a Common Law power to order inspection of certain documents, but they have no power at Common Law to order discovery. By 14 & 15 Vic. c. 99, s. 6, the power of ordering inspection was enlarged. It is not all documents which may be inspected, but only documents in cases in which previously to the passing of the Act a discovery might have been obtained by filing a bill, or by any other proceedings in Equity." Per Willes, J., *Hill v. Campbell* (*ubi supra*).

In *Gomm v. Parratt* (26 L.J. C.P. 279), a Plaintiff claiming dower out of property purchased by Defendant without notice, was refused inspection of Defendant's conveyance, on the ground that a Court of Equity would not have granted discovery. In *Hunt v. Hewitt* (21 L.J. E. 210), inspection was granted of Plaintiff's books to see if there were any entry, and, if any, what price was charged as the value of the work for which the Plaintiff was claiming against the Defendant, whose affidavit in support of the application asserted that the work was not done, and, if so, was charged for exorbitantly. In *Stone v. Strange* (34 L.J. E. 72), the Court allowed inspection of Defendant's letters to Plaintiff in an action for breach of promise of marriage; and in *Tape v. Lister* (40 L.J. Q.B. 87), a similar order was made; and, notwithstanding some earlier decisions to the contrary, it was laid down in *Price v. Harrison* (29 L.J. C.P. 335), that where a document is relied on by one side, whether stated in the pleadings or not, the opposite party is entitled to see it, whether he be a party to it or not, and whether he be otherwise interested in it or not: per Willes, J. And, in the same case, Erle, C.J., says, "if there had been a formal agreement between the parties the Defendant would be entitled to see it; so, also, if letters are evidence of the agreement, though not the agreement itself, in my opinion they clearly fall within the same rule."

In *Mahoney v. National Widows Insurance Company* (40 L.J. C.P. 203), inspection was ordered of confidential reports made at the instance of the Defendants on the insurance under which the Plaintiff in that case claimed, and in *Fenner v. London and South-Eastern Railway* (41 L.J. Q.B. 313), answers obtained to inquiries instituted by the Defendants were ordered to be produced for the inspection of the Plaintiff; but, in *Peppiatt v. Smith* (33 L.J. 239), interrogatories as to particulars of injuries suffered by Plaintiff through Defendant's negligence were refused. In *Becher-vaise v. Great Western Railway* (40 L.J. C.P. 8), the Plaintiff

was not allowed to interrogate the Defendants as to the cause of the accident which was the subject of the action. And in *Turner v. Goulden* (43 L.J. C.P. 60), in an action against Defendant for negligence in making a valuation of certain property for the Plaintiff, the latter was allowed to interrogate Defendant as to the basis on which the valuation complained of had been made.

More recent decisions, however, have negatived the right of a Plaintiff to obtain from Defendant discovery or inspection of medical reports upon the Plaintiff's condition, made by direction of the Defendants (*Cossey v. London and Birmingham Railway Company*, 39 L.J. C.P. 174; *Skinner v. Great Northern Railway Company*, 43 L.J. E. 150).

In *Phillips v. Routh* (41 L.J. C.P. 111), the Court refused to allow interrogatories by the Plaintiff as to particulars relating to the cause of action obtained by the Defendant since the commencement of the action; and, in *Allen v. Brogden* (43 L.J. C.P. 206), inspection of private confidential letters between the Plaintiffs written before action was refused.

All these cases, it will be seen, are decisions which were made prior to the Judicature Act, and the result of them appears to show that disclosure of reports or letters containing particulars obtained by agents of the parties, whether before or after litigation, was discountenanced by the Common Law Courts, notwithstanding that Courts of Equity would unhesitatingly grant such discovery, and although the Common Law Courts claimed to possess larger powers of discovery than were vested in Courts of Equity. The explanation probably is that the Common Law Courts have always exercised a very wide discretion in cases of discovery, and have not regarded it in any way as a matter of right, but have been influenced in their decisions by the circumstances of each particular case.

Under the Judicature Act, where any distinction exists between Equity and Law, the principles and practice of the

former are to prevail (sect. 25). In particular, in reference to inspection and discovery it is provided that any party shall be entitled to inspection of any document mentioned in any pleading or affidavit, on simply giving notice to the party in whose possession the document of which inspection is desired appears to be (ord. 13, r. 15); and any party who desires to ascertain whether his opponent has any documents which may aid him in establishing his case may obtain without affidavit an order as of course for such opponent to state on oath what documents he has or has ever had material to any matter in issue in the action (ord. 13, r. 11). This statute introduces in effect the rule which has prevailed in Equity since the statute 15 & 16 Vict. c. 86, and the right of inspection and discovery are now placed upon the same footing in all respects. The defendant or plaintiff may now be compelled in any action, as soon as his opponent has pleaded, to discover what documents he has or has had in his possession, and to give inspection of them, subject to any objection which he may make by his affidavit giving the required discovery (see order 31, r. 13). It is the operation of these enactments of the Judicature Acts which has been considered by the Court of Appeal in the case of *Anderson v. The Bank of British Columbia* (L.R. 2, Ch. D. 644; 45 L.J., Ch. 449; 35 L.T. 76, 24 W.R. 624) on appeal from a decision of the Chancery Division of the Supreme Court, and in *Bustros v. White* (L.R. 1 Q.B.D. 423; 45 L.J., Q.B. 642; 34 L.T. 835; 24 W.R. 721) on appeal from the Queen's Bench Division of the Court, and the result is that the principles on which the Courts of Equity have hitherto acted are now adopted for all the Courts.

The question in each of these cases was whether certain information which had been obtained by an agent of one of the parties with a view to the litigation which afterwards ensued was within the rule that a man is not bound to disclose confidential communications between himself and his solicitor, or evidence which he has obtained for the

purpose of litigation. The Divisional Court of Queen's Bench, sustaining the refusal of the Judge at Chambers, had declined to order the desired discovery in the second of the above cases, and the Master of the Rolls had ordered it in the first case. The Court of Appeal upheld the decision of the Master of the Rolls, and reversed that of the Queen's Bench Divisional Court.

In delivering judgment in the case of *Anderson v. the Bank of British Columbia* (the first of these cases), James, L.J., says, "As to the cases at Law, they seem to have been brought now, at least, very much in conformity with the principle of the cases in Equity. They may possibly all be based upon this, which is an intelligible principle, that you have no right to see your adversaries' briefs," and he shows that a communication between a principal and his agent giving information of the facts and circumstances of the very transaction which is the only subject-matter of litigation is not of that character. Mellish, L.J., says, "Having regard to the general rule that the practice in Equity is to prevail, and that the 11th rule of the 31st order is taken from Equity practice, there can be no doubt that the rules previously existing respecting discovery in the Court of Chancery are now binding upon all the Courts." After showing that the desired discovery was not privileged as a communication between a client and his solicitor, he observes, "In reference to the question whether it was privileged as being evidence obtained for the purpose of litigation, there may be some very nice questions, particularly when the evidence is not obtained for the direct purpose of being given in the action, but in order that the party who seeks it may determine whether he will defend or commence an action. If the information is really and simply information obtained respecting his evidence, I do not think it necessary to give my opinion on the present occasion whether it would be privileged or not. It might be that it would be privileged just as much if obtained before as if it was sent after the

action was commenced. As a general rule, no doubt, a person is not bound to give discovery respecting that."

Baggallay, L.J., in the same case, after pointing out that this discovery sought was of facts known to the defendant's agent as such agent, says, "I can understand no possible ground, consistent with the recognised principles on which discovery is given in suits in Equity, upon which the information afforded by the letter (of which discovery was sought) can be withheld. It might be very different, indeed, if the letter had contained certain matters not within the knowledge of the writer, or not within his means of information in the ordinary discharge of his duties."

In the case of *Bustros v. White* (45 L.J., Q.B. 642) Cockburn, C.J., and Coleridge, C.J., had decided that correspondence between the plaintiffs (merchants in Liverpool) and Riso (their agent in Hull), and between the plaintiffs and their firm at Alexandria, was privileged. The Court of Appeal, before which the question was argued, consisted of the Master of the Rolls, Kelly, C.B., James, Mellish, and Baggallay, LL.JJ., Lush and Denman, JJ., and Pollock, B., and judgment was delivered by the Master of the Rolls after retirement of the Court to consider the matter.

The Common Law element in the Court of Appeal, therefore, preponderated in the proportion of 5 to 3, and it may reasonably be expected that due weight was given to the more restricted view of the right to discovery which had been acted upon in the Divisional Court of the Queen's Bench Division. In supporting their order before the Court of Appeal the counsel for the plaintiff argued that the documents in question were privileged as being quasi professional, a term under which the rule relating to professional privilege has been sometimes enlarged. In giving judgment the Master of the Rolls laid down the rule which is henceforth to govern all the branches of the Court on this subject in the following words:—"By quasi professional privilege I understand this, that the communication may be protected when it does not

proceed from the solicitor directly, but is information sent at his instance by an agent employed by him, or by his client on his recommendation ;” and he held that the documents in question did not come within that rule or any other known rule as to privilege.

The case of *Bustros v. White* (45 L.J. Q.B. 642), is also important for having determined another question which has been productive of much difference of opinion in the Common Law Courts. As has been observed, it has always been theoretically a part of the Common Law Jurisdiction of the Courts to grant inspection of documents, irrespective of the Statutory powers which have been at various times granted ; and, in some cases, it has been considered that they had a discretion to refuse it where the production would give one party an undue advantage, as if the effect of the production would be to enable the Defendant to use a document, not directly Evidence for the Jury, in an indirect manner against the Plaintiff, either by founding upon it a damaging cross-examination, or raising other topics of prejudice in relation to it. And, in the case of *Bustros v. White*, the desired discovery was resisted on this ground. In giving judgment, the Master of the Rolls, said : “ This case raises a question of very considerable importance, as to whether under the Judicature Acts the Judge has any discretionary power of refusing to allow the inspection of documents by a party to the action, except on the ground of privilege ; in other words, whether, when the document is not protected by reason of privilege, the Judge can exercise any further discretion. We think he cannot.” After observing that the 11th rule of the 31st order under the Judicature Act is copied from the 31st section of the Chancery Improvement Act (15 & 16 Vic. c. 86), and that it had been held that that section did not alter the right to the production of documents, and did not confer any discretionary power on the Judge, but that the right remained unaffected, and was exerciseable at the option of the parties where no privilege could

be established, his Lordship said, "Under the 25th section of the Judicature Act, if there is any difference between the practice of the Courts of Law and Equity, the practice of the Court of Equity is to prevail. It, therefore, lies upon the party who might have been made a Defendant to a Suit in Equity, to show something depriving the Plaintiff of the right to discovery of documents, which the rules of a Court of Equity could give him, in one or other of the Judicature Acts." After showing that the letter in question was not privileged, he adds, "if its production is a matter of right, as we think it is, it is not now for us to say that the rule applicable to it should be extended, because it might or might not be injurious to the party producing it if it were made use of before a jury."

The conclusion to be drawn from these cases, therefore, is that discovery is now a matter of right, and that inspection can only be resisted on the ground that the document of which inspection is desired, is a communication from or to a Solicitor or his Agent, or that it is evidence exclusively applicable to the establishment of the case of the party objecting to produce it.

In the recent case of *Orr v. Diaper* (46 L.J. Ch. 41) it was decided that a Plaintiff is entitled as of right to this discovery before the trial of the action, not only from a Defendant but from any person possessing information that may be material, though no relief is sought against such person, that is, from a possible witness.

It is to be observed that two methods of discovery may be pursued under the Act, the first under the 13th Order, r. 15, which provides that any party may give notice to the other party to produce any document mentioned in any pleading or affidavits, or may obtain an order as of course, without affidavit, requiring the other party to state on affidavit what documents he has or has ever had material to any matter in issue in the action (Order 13, r. 11); or, secondly, he may deliver what interrogatories he chooses for the examination

of such other party (Order 31, r. 1), subject, as a check upon his otherwise absolute right of delivering interrogatories, to the right of the party interrogated to apply to a judge to strike out any interrogatories which can be shewn to be scandalous, or irrelevant, or not put bonâ fide for the purpose of the action, or if the matter inquired after is not sufficiently material at that step of the action, or on any other ground (Order 31, r. 5).

This order has been acted on in the recent case of *Mansfield v. Childerhouse* (46 L.J. Ch. 30), in which Bacon, V.C., struck out interrogatories filed by a Defendant for the purpose of discovering whether Plaintiff, who was seeking specific performance of an alleged agreement, had been guilty of a breach of trust in entering into the alleged agreement.

J. C. E. WEIGALL.

IV.—PATENT LAW AMENDMENT.

DURING the last two Sessions, Bills having for their object the amendment and consolidation of the Law relating to Patents have been before Parliament. It has long been admitted on all hands that the law regulating Patents is in a very unsatisfactory condition, but up to quite a recent date it has been a moot question whether the Patent Laws should be preserved or not, whether in fact it would not be to the advantage of the community at large, that the patent monopoly should be altogether abolished. Now we do not propose to discuss that question, because

competent authorities have, after most careful consideration, arrived at the conclusion that the granting of patents for inventions, under proper restrictions, is on the whole beneficial to the public. Moreover, it is proposed to remove the chief objection that has always been urged against the granting of patents, by putting patentees under an obligation to grant licenses.

If any there be who still think that the amendment of the Patent Laws should be tentative and gradual, we would remind them of the length of time during which the law has remained in its present admittedly unsatisfactory condition. If whilst we maintained an undoubted superiority as regards our staple articles of manufacture we could afford to be somewhat indifferent on the subject, we can no longer afford to remain so, now that not only is our superiority as regards many of our manufactures seriously questioned, but, as regards some of them, our manufacturers are no longer able by reason of the cost of labour in this country to compete with manufacturers abroad. Though we may not have been conscious of the extent to which we have been indebted to labour-saving machines for our superiority in the past, we cannot fail to recognize the importance of such machines to us in the altered condition of things. A measure, therefore, which may have the effect either of stimulating or retarding the production of labour-saving machines, deserves to be carefully considered, and we require no further justification for calling public attention to the Bill of Lord Cairns for consolidating and amending the Patent Law, which was introduced by him into the House of Lords last Session, and will doubtless be re-introduced next Session. That Bill is founded in a great measure upon the recommendations of a Select Committee of the House of Commons, which in making its report had the advantage of the labours of the Royal Commission appointed in 1865.

We do not propose to enter upon a consideration of the general provisions of the Bill, as for the most part we

think they will be found to recommend themselves to all persons who have considered the subject. But we do desire to direct attention to two of the principal provisions, which we think will, if left as they at present stand, greatly militate against the usefulness and completeness of the measure. The one relates to the granting of licenses by patentees; the other, to the cost of obtaining patents. Amongst the recommendations contained in the report of the Committee, appointed in 1872, to inquire into the law and practice, and the effect of grants of Letters Patent for inventions, the following will be found, namely, "that all Letters Patent shall contain a condition that licenses be granted by the patentee to competent persons, on fair conditions, such conditions, as well as the fact of competency, to be determined in the event of disagreement by the Commissioners, due regard being had in such determination to the exigencies of foreign competition." Now the 26th section of the Lord Chancellor's Bill, which purports to deal with this recommendation, is as follows:—"A patent shall be liable at any time after the expiration of two years from its date to be revoked on either of the following grounds:—*(a.)* That the patentee fails to use or put in practice the invention, by himself or his licensees, to a reasonable extent, within the United Kingdom, or to make reasonable efforts to secure the use or practice thereof there, proof of the contrary whereof shall lie on him. *(b.)* That it is made to appear to the Lord Chancellor that, in order to ensure a proper supply to the public of articles produced under the patent, or proper means for the use of the invention by the public, licences are necessary, and the patentee fails to grant licences to proper persons requesting the same, on terms which the Lord Chancellor, having regard to all the circumstances of the case, deems reasonable." Now it will be seen that this clause is very far from carrying out the recommendation of the Committee. The granting of licenses is sought to be secured by indirect means, instead of its being made a con-

dition in the grant of a patent, that licenses shall be accorded by the patentee. Moreover, the method adopted in the Bill is clumsy and expensive. Under such a clause where a patentee objects upon any grounds to grant a license, the person seeking to obtain one will be driven to the necessity of taking proceedings to revoke the patent. Such proceedings will necessarily only be instituted in cases where the patent is of very great value, and by persons possessed of considerable means. Again, the remedy provided is only to be available two years after the date of the patent. There can be no injustice or hardship in making it obligatory upon the patentee to grant licenses upon reasonable terms, that is to say, upon such terms as will secure to him a fair remuneration, and give him an advantage in the production of patented articles over his licensees. And it will doubtless be greatly to the advantage of the public to have the granting of licenses made absolutely compulsory, and do much to meet the objections of those who are opposed to all monopolies. The only serious objection which can be urged against the carrying out of the recommendation of the Committee is the expense and difficulty of providing a competent tribunal to determine the terms upon which licenses shall be granted, in cases where the parties differ. But it will rarely happen that an appeal to any tribunal is necessary. Once make the granting of licenses compulsory and it will soon become a matter of course for patentees to offer to grant them on fair terms. Such is the case in America, where, though the granting of licenses is not made compulsory by law, yet so strong has the custom in favour of granting them become, that the refusal on the part of a patentee to grant them would be found seriously to prejudice him in any action he might bring for the infringement of his patent. The measure is one of vast importance to the various industries of the country. With a surplus income derived from patents of nearly £80,000 per annum, the question of expense cannot be a formidable obstacle. The difficulty of providing a competent tribunal cannot surely be insuperable.

In considering the question of the cost of obtaining patents, and the desirability of affording greater facilities for obtaining them, we cannot do better than refer to what has taken place in America, where greater attention has been paid to the law regulating the grant of patents, than in any other country in the world. The remarkable fertility of invention which has been exhibited in America is perhaps attributable to several causes. Amongst others may be mentioned the system which has grown up there of granting licenses, not for the manufacture only of patented articles, as in this country, but for the sale of them, which gives to the patentee a very considerable additional source of profit. The chief stimulus, however, is undoubtedly to be found in the scarcity of labour formerly existing in that country, which gave to all inventions by which manual labour could be saved an abnormal value. Moreover, it was seen by the legislature that the progress and development of the country in no small degree depended upon the success which should attend the efforts that were made to dispense with manual labour; and everything possible was done to foster a spirit of invention. The patent laws were constantly subjected to amendment with a view to affording increased facilities to inventors and more fully securing the benefit of patents to the public. The cost of obtaining a patent, in America, lasting over seventeen years, was made almost nominal as compared with the cost in this country. It must be admitted that the great facilities that were afforded resulted in some evils, such as the granting of patents for frivolous inventions, and an undue sub-division of patents. The evils which grew up, however, were for the most part the result of a lax administration of the law. On the other hand, it cannot be denied that the facilities afforded did much towards overcoming the great obstacle to the development of the country presented by the deficiency of labour. Now that owing to the cost of labour in this country we have been driven out of some of the markets of the world, and have to struggle to maintain

our position in others, it behoves us to strive to stimulate the spirit of invention which undoubtedly exists in this country, by affording greater facilities to inventors so as to obtain further means of dispensing with manual labour, and thus to place ourselves more nearly on an equal footing with those countries where labour is cheap. We cannot grant too many patents to inventors, if only the full benefit of their inventions is secured to the public. At present the cost of obtaining protection for an invention is such as to be almost prohibitive to persons of the artizan class, amongst whom the evidence taken by the Committee shows that by far the largest number of inventors is to be found. At present when persons of that class do succeed in obtaining protection for their inventions it is by the aid of their employers, who in numbers of cases are found to monopolize both the credit and profit resulting from the invention. The whole of the stamp duties payable in America in respect of a patent lasting over seventeen years scarcely amounts to one-third the sum required to be paid during the first year in this country: and we believe the office charges are much less in America than here.

Lord Cairns does not in either of his Bills propose to lower any stamp duties on Patents. He told us, on introducing his Bill of 1875, that both the Royal Commission and the Committee were opposed to the lowering of fees. It should be remembered, however, that the Royal Commission sat in 1865, and the Committee in 1872. Even at the latter date, the effect of the increased cost of labour upon our various industries had not been fully realized. The Royal Commission appears to have been impressed with the idea that the number of applications for patents was already large enough, and that to increase the number would only be to add to the obstructions in the way of manufacturers. They do not appear to have taken into account the number of applications that entirely fail, and the enormous number of patents, amounting to seventy per cent. of the whole

number granted, that are allowed to expire at the end of the third year owing to the fifty pounds stamp duty which is then required to be paid. The obstructive element in patents, it is to be observed, will be greatly diminished, if not altogether removed, by making the granting of licenses compulsory. It must not be forgotten, too, that the effect of the examination, to which now for the first time it is proposed to subject all applications for patents, will be to greatly diminish the number granted. It is sometimes urged as an objection to the affording of any facilities for obtaining patents, that they are sometimes made use of for advertising purposes. If such be the case, it is not a serious evil; and it is one which the imposition of heavy stamp duties will have but little effect in preventing. The class of persons who adopt that expensive mode of advertising can much better afford to pay high stamp duties than the generality of inventors. Seeing that the matter is one affecting the prosperity of the country, any additional expense which may be caused by an increased number of applications for patents will not be deemed of much moment, more especially as there is a large surplus income derived from patents. In advocating the lowering of the stamp duties payable in respect of patents, we do not propose to alter the amount of those payable at the end of three and seven years, namely, £50 and £100, because they not only add to the revenue, but, as we think, effect a beneficial weeding, and that too, for the most part, without causing hardship or injustice. By the end of its third year, the value of a patent is in the great majority of cases fully ascertained, and the payment of the £50 stamp duty, if made, works no hardship or injustice on the patentee. But such is far from being the case with respect to the earlier payments. They have to be made at a time when, as regards most inventions, it is impossible to ascertain their real merit and value. The consequence is that the investment of money in obtaining a patent partakes very often

of the nature of a speculation. It must not be forgotten, too, that the cost of preparing the specification and other things requisite, in order to obtain a patent, generally amounts to no inconsiderable sum.

The Committee, in their Report, content themselves with a recommendation, "That the duties payable on patents shall be so adjusted, as to encourage inventors to the utmost to make known their inventions." It will be found, however, on referring to their Report, that almost all the persons who gave evidence on the subject, were of opinion that the earlier payments should be reduced.

C. E. BRUNSKILL COOKE.

V.—THE PUBLIC RIGHT OF NAVIGATION.

(Continued from the November Number.)

THE next element of the public right of navigation, is the right to moor for the purpose of loading and unloading. This right is clearly, within reasonable limits, essential for the convenience of trade and commerce, and its existence is firmly established by authority. But, of all the rights forming the public right of navigation, this is the one most difficult to deal with, both on account of the vagueness which must necessarily attach to the definition of a right, including within its limits such widely different acts as the loading of a small boat or barge, occupying but a few minutes time, and the loading of large steamers occupying, perhaps, many days, and also on account of the coincidence

of great temptation to abuse the right, with great facilities for doing so, to the serious annoyance and inconvenience of the public passing and repassing along the river, and of the riparian proprietors, who cannot always be engaged in litigation to restrain the selfish encroachments, varying, as they must do from day to day, from serious to slight, of persons eager to obliterate, when it can be done with impunity, the boundaries between *meum* and *tuum*.

The right to moor for the purpose of loading and unloading is, without doubt, not locally unlimited. It must be exercised in convenient and reasonable places, having regard to the due exercise of the other public rights over the river. A person, for example, cannot moor his vessel in the centre of the channel along which ships passing and repassing usually sail. That would plainly be an unreasonable place. So a person cannot moor his ship in a mooring-berth, where some other person is in the habit of mooring his ships. It would be unreasonable to fix upon the exact spot which another person is in the habit of using, even although it may not at the moment be actually occupied by him. Theoretically speaking, if that spot were in a part of the river convenient and proper for mooring, each person would have an equal right to moor there, but the exercise of these several rights would be practically impossible. If, in such a case, no public or practical reasons existed why the first occupant should not be left in possession of his usual mooring place, the others finding accommodation in some other place reasonably suitable for their purposes, the solution of the difficulty would probably be, without difficulty, obtained by a sensible verdict of a jury, or a like decision of a judge.

The right to moor must be exercised so as to occupy the portion of the river in which the vessel is moored only for a reasonable time. "To moor a floating storehouse, or vessel, for the receiving and delivery of goods or merchandize in any public river * * * is such a permanent appropriation and

exclusive occupation of a public river, and such an obstruction thereof to its free and common use as to be indictable as a public nuisance."* But there could be no objection, in principle, to one person occupying a particular mooring place by a constant succession of ships, so that the portion of the river so occupied, would, in fact, be permanently obstructed. The public benefit, for which the right is created is secured, and the right is not unreasonably exercised, if no single ship takes longer time to load or unload than is reasonable; and it cannot matter, so far as the exercise of the public right is concerned, whether or not all the ships belong to one person.

There are only two parts of a river where a ship can be conveniently moored, namely, in the part between the edge of the usual navigating channel and low water mark, and alongside the banks or wharves. The public right of navigation certainly includes the right to moor in the former part. In the case of the *Attorney-General v. Philpott*, decided so long ago as 8 Ch. 1, an information against certain persons in respect of an alleged purpresture in the Thames, stated "that the defendants had lately encroached upon the soil of the king, and had thereby stopped the course of the river, and rendered it less convenient for shipping and for their *mooring in the pool*."†

It is equally certain that a riparian proprietor has a right to moor vessels alongside his wharf, for the purpose of loading and unloading them. But, in doing so, he is not exercising the public right of navigation only. He is exercising two rights, the one his private right of access to and of landing on his wharf, and the other, the public right of navigation, which enables him to justify the mooring of his

* Angell, on Tidal Waters, p. 118.

† Cited in the Report of *Attorney-General v. Richards*, 2 Anst. 603. The "pool" is that part of the river Thames, between the edge of the usual navigating channel and low water mark, which lies between London Bridge and Cuckreld's Point.

vessel as against all persons, merely seeking to exercise the right of passage, to whom alone his vessel, when moored, can be a physical obstruction. As regards them, it is a "legal preoccupation" of that portion of the channel.

But does the public right of navigation give all persons a right to moor their vessels alongside the banks of the river, so as to overlap either wholly or partially, a private wharf, without the consent of the owner of the wharf? Such a right is *prima facie* so unreasonable, and its exercise would be so injurious to riparian owners, and detrimental to the convenient carrying on of trade and commerce on navigable rivers, that either strong and explicit authority would be required to establish its existence as a common law right, or a person claiming it would need to show a paramount necessity and long-established usage, to support it as a right acquired against the injured riparian owner by custom. But there is no single trace of any such right ever having existed, or, indeed, ever having been claimed as part of the public right of navigation, until the decision of the Lords Justices in the case of *Lyon v. The Fishmongers Company*,* (now reversed by the House of Lords), suggested to people with small water frontages that they need not be very particular as to the size of the vessels they used, because, if they overlapped the adjoining wharf, they would merely be exercising the public right of mooring for the purpose of loading and unloading. "A man," said Mellish, L.J., "having a mere right of way, the narrowest possible, down to the water edge, has as much right as the owner of the most extensive riparian property to the reasonable use of any portion of the navigable river, for the purpose of loading or unloading goods, or embarking or disembarking passengers." And, again, "a coal barge in the Thames unloads at a wharf, but it loads from a collier in the pool, and it lies alongside the ship to load in exercise of precisely the same right as when

* L.R. 10 Ch. App. 679. 1 App. Cas. 662.

it lies alongside the wharf to unload." But, although the above passages would seem to imply that the right to moor alongside a wharf is nothing more than a part of the public right of navigation, and, therefore, exerciseable without reference to the ownership of the wharf frontage, there are other passages showing that Lord Justice Mellish did not mean to go so far in giving to all persons such a "hateful privilege of vexing their neighbours." "We cannot find," he said, "any authority to the effect that the riparian proprietor whose property terminates at high water-mark, has any greater rights over the river, or the shore between high and low water, than any one else, except this: that the fact of his being the owner of private property immediately adjoining the shore of the Crown, enables him to go on the shore for the purpose of embarking and disembarking from vessels on the river *at parts of the shore where other persons cannot get*; and at high water, if the water comes up to his property, *he can bring a vessel close up to his property, and so use his property as a wharf for the loading or unloading of goods.*" The right to bring a vessel close up to a wharf, is there treated as a right which can only be possessed by the owner of the wharf; but Lord Justice Mellish, while apparently admitting the existence of that right as one possessed only by the owner of the wharf, thought that it was merely part of the public right of navigation, and, as such, extinguishable by the license of the Conservators of the Thames. The House of Lords, however, as we shall presently see, have decided that one element at least of the right in question, namely, the right of access, is a private right.

If the right to moor alongside private wharves for the purpose of loading or unloading, is part of the public right of navigation, it must have been part of the right originally yielded to the public by the policy of the law, for the benefit of trade and commerce. But what benefit could possibly have been conferred upon commerce by the existence of such a right? Although, by the civil law, the public appear

to have had a right to land on the banks of navigable rivers,* the case of *Ball v. Herbert*† decided, once and for ever, that no such right was known to the English Law. If, then, the public had no right to land themselves, or their goods, what possible object could be served by allowing them to moor alongside? The public facilities for loading and unloading were ample, without creating any such inequitable and useless right. A person who owned a wharf could moor there such vessels as he had proper accommodation for, and, for all other vessels he could, like the rest of the public who did not care to purchase a river frontage, use a public wharf or moor in the pool, which was, in fact, the common way of mooring. The most extensive right of mooring which can be exercised in the pool, is a right to moor for the purpose of loading and unloading, and it would be unreasonable that the public should actually have an equally extensive right to moor alongside a private wharf.

The cases contain little that bears directly upon the point, whether the public right of navigation includes a right to moor alongside a private wharf so as to overlap it, but they establish clearly that riparian proprietors have a private right of access to their property; and, if that be so, it follows that the public right of navigation cannot include a right to moor, so as to destroy that right of access. The public right must end where the private right begins, and there is ample and recent authority supporting and defining the private right, while the extension in question of the public right is condemned by reason and unsupported by authority.

In the case of *Stephen v. Costor*,‡ the plaintiff, a wharfinger, sued to recover wharfage and cranage dues, in respect of part

* *Riparum quoque usus publicus est juris gentium, sicut ipsius fluminis. Itaque navem ad eas adplicare, funes arboribus ibi natis religare, onus aliquod in his reponere, cuilibet liberum est, sicut per ipsum flumen navigare.*—*Just. Inst. Lib. 2, Tit. 1, § 4.*

† 3 T.R. 253.

‡ 3 Burr. 1408.

of the cargo of a barge which had been moored alongside and fastened to his wharf. Part of the cargo had been unloaded and landed upon the wharf, and dues paid in respect of it; but, while that was being done, another part of the cargo was being put into lighters from the other side of the barge, and carried away on board these lighters. The plaintiff claimed dues in respect of that latter portion of the cargo, but the Court decided in favour of the defendant; basing their judgment, however, solely upon the form of the action and the construction of the Act of Parliament which authorized the plaintiff to claim dues. Lord Mansfield, in his judgment, expressly negatives the existence of a common law right to moor in such a way as to overlap or obstruct the access to a wharf. "If" he said, "an injury has been done to the wharfingers *by lying before their wharf*, or by fastening the vessel to it, without right, or in any way whatever they may have their remedy in another method, but not under this Act of Parliament." And, again, "a wharfinger has his remedy in damages, as he had before the Act, if the vessel should colourably come and lie before his wharf, or moor or fasten to it, without intention of loading or unloading upon it," which, under the Act, he had a right to do on payment of the dues exigible.

The case of *Wyatt v. Thompson* * is a strong authority against the existence of any common law right to moor, so as to interfere with the access to a private wharf. That was an action of trespass for cutting the mooring rope of the plaintiff's barge, which had been, without consent, fastened to the defendant's wharf in the Thames; and the plaintiff, in his replication to the defendant's plea, that the barge was wrongfully fastened and moored to his wharf, justified his trespass by alleging a custom for all the king's subjects sailing, rowing, and passing by and with their barges upon the said river, during the time of low water,

* 1 Esp. 252.

to moor and fasten their barges by ropes to any wharf most convenient for that purpose, and to keep them so moored until high water, leaving sufficient room during the time of such mooring and fastening for all persons having occasion to use the said wharves. Lord Kenyon thought that the witnesses had proved the custom pleaded, and the jury found "That the custom of mooring barges at low water is for one tide at the piles in front of the wharf, and, if there are no piles, the custom does not allow the barges to moor at the wharf unless through distress." Now, if there existed a common law right to anchor or to moor the barge in a place where it obstructed the access to a wharf, there would have been no necessity for the plaintiff to rely upon a custom.

There is an anonymous case reported in a foot note in 1 Camp. 517, but the report is so imperfect that it is scarcely a trustworthy authority. It was an action for disturbing the plaintiff's fishery in the Tweed, by mooring a ship "against a rock on the bank of the river where she delivered her cargo;" and was, therefore, a conflict between a person exercising the primary right of navigation, and another seeking to protect the subordinate right of fishery, both being public or common rights. The rock where the defendant's ship had moored seems to have been a usual mooring place, and the riparian proprietor probably consented to the vessel being moored, as it is clear that without his consent the goods could not have been landed as they were. Wood, B., in giving judgment in favour of the defendant, said, "A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse that right so as to work a private injury, they are liable to an action. * * * The only case I remember like this, was where a man obstinately refused to move his ship from opposite a wharf, although it would have been just the same if he had moved a little one way or the other; and, there-

fore, he abused his right, and the plaintiff recovered." The case he refers to, seems to have been one where a ship was moored in the pool opposite a wharf, where there is no doubt a public right to moor, but one which must be exercised reasonably, and with due regard to the convenience of the riparian owners, as of the rest of the public.

In the case of *Rex v. Russell*,* Holroyd, J., in the course of his judgment, says, "The defendants getting their coals by a proper access to and upon the river, would have a right to load ships lying and continuing in the river for that purpose by the means of keels, although the doing so might be a temporary, and by doing it successively to different ships, might be a continued, *though not total*, obstruction or inconvenience to the navigation. And there would be a right to keep the ships and keels in the river for that purpose *in convenient and proper places*, at times not confined to the times of their being in actual use." A right to moor in convenient and proper places, is a very different thing from a right to moor in such a manner as to overlap a private wharf, and deprive its owner of his right of access to any part of his wharf frontage.

But, let us deal for a moment with the question from the other point of view, that, namely, which negatives the existence of a public right to moor alongside a private wharf without the consent of its owner, by proving the existence of a private right of access to the wharf which would be interfered with by the exercise of any such public right. The existence of the right in question may be disproved, either by showing that the public right of navigation does not *include* it, or by showing that the private rights possessed by the riparian proprietors do *exclude* it.

The earliest and most important case is that of *Rose v. Groves*,† which has recently been explained and approved by the House of Lords.‡ That was an action brought by the

* 6 B. & C. 566.

† 5 M. & G. 613.

‡ *Lyon v. The Fishmongers Company*. 1 App. Cas. 662.

owner of a tavern abutting on the river Thames against the defendant for obstructing the access to the tavern by floating timber on the river, which drifted opposite and against the plaintiff's premises. There was no dispute in that case, that the defendant had a right, as one of the public, to float timber on the river. In the course of the argument, Erskine, J., said, "The defendants had a right to float timber on a navigable river." The jury found a verdict for the plaintiff, and the case then came before the Court on a motion for a rule to arrest judgment, which was refused. In the course of the argument, Maule, J., said, "This is not an action for obstructing the river, but for obstructing the access to the plaintiff's house." And the judgment of Maule, J., is explicit on the point that a riparian owner has a private right of access to his premises, with which the public right of navigation does not and cannot interfere. "The declaration," he says, "states in substance that the defendant had placed timber upon the river in such a manner as to prevent customers coming to the plaintiff's house. That is an injury to the plaintiff with which the public have nothing whatever to do." No doubt the defendant could have floated his timber in the pool, although it would have had the effect of seriously diminishing the convenient approach to the plaintiff's house, for the only question would then have been whether the place, time, and conditions of floating it were reasonable. But it was floated so as to prevent access to the plaintiff's premises for a short space of time at high water, just as a ship moored alongside a wharf prevents access, while so moored, to such part of the wharf as it overlaps.

In the case of *Kearns v. The Cordwainers Company** the distinction between the right of convenient approach to water-side premises and the right of access to the same premises is the basis of the decision of the Court. The question raised in that case was whether a license granted by the

* 6 C. B. (N.S.) 388.

Conservators of the Thames to a riparian owner to erect a wharf and jetty projecting into the river in front of his premises would protect the licensee from all proceedings in respect of the erection. The Thames Conservancy Act, 1857 (20 & 21 Viet., cap. 147,) sec. 53, gives the Conservators power to license certain erections in the river, although the public right of navigation should be obstructed thereby, but it was argued that they had no such power to interfere with private rights. The Court thought that, for the purposes of the case before them, it was unnecessary to decide that point, because no private right was then interfered with, holding that the license in question was valid because "the erection which the Conservators are about to authorize is not one which is immediately brought into contact with or can directly interfere with the *access* to the premises of the adjoining owners. The whole interference which can be made matter of complaint is simply the commodious approach to the premises by means of the river." So far as the judges in that case expressed opinions upon the nature of a riparian owner's right of access they are now discredited and overruled. Speaking of it in *Lyon v. Fishmongers Company* the Lord Chancellor said, "There was no adjacent owner before the Court, and the Court proceeded upon the supposition of what might be said for or against those who were not there to argue their own case. I cannot, therefore, look upon the expressions of the learned Judges in that case as entitled to the same weight as if they had been made after an actual issue of right had arisen."

So in the *Attorney-General v. The Conservators of the Thames*,* Lord Hatherley, then Vice-Chancellor, based his decision upholding the validity of a license to make certain erections in the channel of the river expressly upon the fact that the erections in question merely rendered the public right of convenient approach to the relator's premises

* 1 H. & M. 1.

less commodious leaving the private right of access untouched. But he fully recognizes the existence of a private right of access. "I apprehend," he says, "that the right of the owner of a private wharf, or of roadside property, to have access thereto is a totally different right from the public right of passing and repassing along the highway or the river, and it would be the height of absurdity to say that a private right is not interfered with, when a man, who has been accustomed to enter his house from a highway, finds his doorway made impassable, so that he no longer has access to his house from the public highway. This would equally be a private injury to him whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. . . . Independently of the authorities it seems to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right."

In the case of *Lyon v. The Fishmongers Company*, the plaintiff claimed an injunction to restrain the defendants from acting upon a license of the Conservators of the Thames to extend their wharf so as to block up the access to one side of the plaintiff's wharf. It was argued for the defendants that there was no such right in existence as a private right of access to a wharf, and as for the public right of navigation which the plaintiff had been in the habit of exercising when he moored his craft alongside his wharf, it had been extinguished by the license of the Conservators. Vice-Chancellor Malins granted the injunction, but the Lords Justices reversed his decision. The House of Lords have,

however, recently reversed the decision of the Lords Justices. Their Lordships held that the right of a riparian proprietor to have access to and from his property and the river is a private right entirely distinct from the public right of navigation. "Unquestionably," said the Lord Chancellor, "the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *quâ* owner or occupier of any lands on the bank, nor is it a right which, per se, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place: and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction. * * * *

The taking away of river frontage of a wharf, *or the raising of an impediment along the frontage, interrupting the access between the wharf and the river*, may be an injury to the public right of navigation; but it is not the less an injury to the owner of the wharf, which, in the absence of any Parliamentary authority, would be compensated by damages, or altogether prevented."

The judgments of Lord Chelmsford and Lord Selborne are as emphatic as that of the Lord Chancellor in asserting the possession by every owner of land, having a river frontage, of a private right of access, with which neither the public nor the Conservators of the river can interfere in the slightest degree. Now it is quite clear that a vessel moored alongside one wharf so as to overlap the adjoining wharf does interfere with the right of access to that wharf, and, as no question can arise as to whether the interference is or is

not reasonable in cases where a private right is the subject of interference, it follows that the wharf owner whose access is interrupted has a right of action.

But what is the practical distinction between the right of access and the right of commodious approach to a wharf? In the *Attorney General v. The Conservators of the Thames* the two rights are distinguished thus: "The wharf will not be as readily and easily approached, and perhaps not at all by the same route; but that is a mere interruption to the navigation of the river which they enjoy in common with the public, and not as part of their special right of access. Persons who frequent either this or any wharf will be impeded to a certain extent in the navigation of the river; but that is an injury to the general right of navigation. It amounts only to this, that the plaintiff's goods will have to take a longer or less convenient course in coming up to their wharf; an inconvenience the same in kind, though not in degree, as that which the rest of the public will be exposed to. The right interfered with is not the private right of access, which still remains, but the *right of approaching from a distance* which forms part of the public right of navigation."

The meaning of that passage seems to be that if sufficient space be left to enable ships of a size suitable to the frontage of the wharf to get alongside, then the right of access is not interfered with, although the ships, in order to reach the wharf, have to take an inconvenient route—for example, in the case of a jetty projecting from the adjoining wharf, are forced, instead of sailing directly along the river up to their wharf, to double the point of the jetty in order to get alongside; but if a ship is actually prevented, for however short a space of time, from getting alongside the wharf, or, being alongside, from leaving it, then the private right of access is interfered with. That is an intelligible and reasonable distinction, and has the high authority of Lord Hatherley to support it.

And if Lord Hatherley's illustration of the distinction between the private right of access and the public right of navigation be correct, it is a very apt one to reveal the fallacy of comparing a navigable river to a highway on land. The comparison has frequently been made, with confusing results, since the year 1789, when Mr. Justice Buller impatiently exposed its fallacy. "Callis," he said in *Ball v. Herbert*,* "compares a navigable river to a highway, but no two cases can be more distinct."

The mooring a vessel alongside a wharf so as to overlap the adjoining wharf has been compared to the stopping a waggon in the street in front of a house door. Every inch of wharf frontage must of course be treated as a doorway space. But in addition to the immense practical difference between loading and unloading a waggon, which can be moved on the shortest notice by a crack of the whip, and of which the loading can be completed in not many minutes, and the loading of, say, a large steamer, which, during the days its loading must occupy, cannot be moved without steam power, and therefore cannot practically be moved at all; between the facility of marshalling the traffic in a street, and the difficulty of doing so on a river, where horse and cart become unwieldy and valuable vessels liable to be damaged by collision, and dependent on the state of the weather for even the possibility of unfastening their mooring chains; between the nature of the traffic, which in a street is usually of a kind that can be carried to and from a waggon with almost equal facility whether or not the waggon be in front of the warehouse door, and the traffic on a river, which can only be loaded or unloaded, unless by the use of boats or lighters, by mooring the vessels close up alongside the wharf; in addition to all these and more wide differences which make the analogy practically worthless, there is likewise an essential distinction in principle between the two cases. A

* 3 T.R. 254.

waggon in the street is like a ship moored in the pool; it does not block up the access, but merely renders the approach to a doorway less convenient. If it does more, if it actually prevents access, then the stoppage is an illegal interference with private rights, which would be restrained. But a ship moored alongside a wharf so as to overlap the adjoining wharf, absolutely prevents access for the time being to so much of the wharf as it overlaps, for any of the purposes for which wharves are used. And if there is a right to overlap for a small distance there must be a right to overlap for any distance. In each case it would be the exercise of a right to moor for the purpose of loading and unloading. A timber ship, for example, unloading from the stern, could be moored wholly across the frontage of an adjoining wharf, and the right to restrict the owner of the ship to a reasonable time in the exercise of his right would be little consolation to his injured neighbour, who would be apt to consider it unreasonable that his business should be stopped even for a reasonable time. Water frontage is the chief element of value in waterside premises, and that would be a term meaning nothing but annoyance, damage, and litigation if there were a public right to moor alongside the banks of a navigable river, without regard to the ownership of riparian property.

It seems therefore to be clear, both on authority and on principle, that the right to moor which forms part of the public right of navigation is not locally unlimited, but is confined to such places as are reasonable having regard to the circumstances of the river, and that in no case does it extend to any place where its exercise would interfere with the established private rights of riparian proprietors.

The public right of navigation, then, is threefold. It consists, firstly, of a right to pass and repass, at all times of the tide, along all and every part of a navigable river; secondly, of a right to anchor in convenient and reasonable places, or through distress, anywhere, as ancillary to, and for the convenient exercise of the right of passage; and,

thirdly, of a right to moor for the purpose of loading or unloading in such parts of the river as can be conveniently occupied for that purpose, without undue interference with the other public rights existing upon and over a navigable river, and without any interference with the private rights of riparian proprietors.

G. STEGMANN GIBB.

VI.—THE LAND SYSTEM OF BOSNIA.

THE old saying that "History repeats itself" cannot but rise to our recollection as we read the following words written by a Polish exile, Count Valerian Krasinski, in 1853:*

"There can be no doubt that the Slavonians of the Turkish Empire, who constitute the greatest part of its European population, will exercise a decisive influence on the fate of the Ottoman Porte; and the preservation of this Power, or its dissolution, will mainly, if not entirely, depend upon the political turn which those populations will assume in a crisis that seems rapidly approaching." It is not too much to say, looking at the present condition of the Porte, and of European Politics in relation to the Ottoman Empire, that the crisis which seemed impending when Count Krasinski wrote, is now actually upon us, however it may be partially delayed by diplomacy. Under the circumstances, it will be well for us to remember that these Slavonians who again, as in 1853, "are forcing themselves upon the attention of Europe, have exercised since the Middle Ages a decisive influence on the

* Montenegro, and the Slavonians in Turkey, by Count Valerian Krasinski. London, Chapman & Hall, 1853.

Byzantine Empire, and formed independent States which played no inconsiderable part in the struggles between West and East, between Christendom and Islamism."

This fact, and its importance as one of the keys to the solution of the Eastern Question, has been at length acknowledged by the Diplomats and Statesmen of the West, and will probably need nothing more to keep it before the European Concert than a continued advocacy by the representatives of the great Slavonic Empire of the White Czar. There is, of course, also the Hellenic factor in the problem, as Mr. Gladstone has recently reminded us, but the Slavonic factor is the one most immediately demanding our attention, and most directly operative for a peaceful solution.

In order to understand clearly the condition in which the Slavonic inhabitants of South Eastern Europe, at present under the more or less direct sway of the Sublime Porte, come before the Western Powers as suffering under grievances which those Powers must insist upon having redressed, if they wish to stave off a conflict of Races and Religions perhaps more bitter and fatal than any which has yet been known, it may be of use to consider the laws under which land was held, and the relations existing between lords and tenants, at the time of the outbreak of hostilities. For the present we propose confining our attention to Bosnia, and we are fortunately able, on this branch of the subject, to compare the statements of a Northern Slavonian exile (Count Krasinski) made more than twenty years ago, with those of a modern Western Diplomatist (M. Frédéric Debains), whose country has on previous occasions rendered good service in the adjustment of earlier phases of the Eastern Question. M. Debains, as a Secretary of Embassy in the French Diplomatic Service, has enjoyed special opportunities for studying the past and present of the Southern Slavs, and the account given by him in a paper read before the Society of Comparative Legislation, in Paris,* has therefore a peculiar value.

* *Bulletin de la Société de Législation Comparée*, Mai, 1876. Paris, Cotillon.

Mediæval Bosnia, as M. Debains points out, was governed by the Feudal System, like all the Christian States of the Middle Ages. This is a feature in Bosnian history which should be carefully borne in mind, as it has been the cause of some curious internal changes among the land-owners, in order to acquire or preserve Feudal privileges. Originally belonging to the Eastern Church, the nobles of Bosnia became Latin, under the influence of Hungary, a conversion of which Count Krasinski observes* that it is said to have been chiefly promoted by the Feudal privileges which they received from the Kings of Hungary. Yet again did these facile Bosnian nobles change their creed, and, seemingly, valuing their privileges more than their religion, on the conquest of their country by the Ottoman Turks in the sixteenth century, they embraced Islam. This is the cause of a complication, namely, the existence in Bosnia of a body of native Mohammedan landowners, very tenacious of their rights and privileges, which must add considerably to the difficulty of Diplomats in solving this portion of the Eastern Question. It must be borne in mind that history shows the problem to be not the conciliation of a nobility alien in blood as well as in religion from the tillers of the soil, but the reconciliation of members of the same race, estranged from the people, whom they have ground down, by the change of religion which enabled them to preserve and even increase the despotism of their sway. Of such a nobility it was to be expected that their Islamism should be, as Count Krasinski tells us it is, "of a peculiar description. Many families have preserved the patron saints who have been chosen by their Christian ancestors; and thus the feasts of St. Peter, St. Elias, St. George, &c., are celebrated by them; a Mahommedan father not unfrequently orders Mass to be said for his sick child; and there are instances of young Begs, or Nobles, having secretly caused a Christian priest to say prayers over the grave of their parents."

* Krasinski, op: cit: s.v. Bosnia, p. 107.

Out of this skin-deep adherence to Islam the renegade Bosnian nobility forged a powerful weapon for the oppression of their Christian fellow-subjects of the Porte. They did not even condescend to learn the language of the Osmanli, though they took a certain pride in calling themselves Turks, and down to the present day use the contemptuous term "Turkuscha" for the Asiatic Turk, who, as M. Debains somewhat sarcastically observes, generally comes among the Bosnian landowners "either as a mere employé, or a nomad without any property." Strong in their landed possessions, these "New Mohammedans" long preserved for their country, but only for the benefit of their own class, a kind of autonomy, which the Porte was obliged to allow to such formidable vassals. They assumed the Imperial privilege of exacting the tenth (*dîme*) in kind on cereals, as a set-off against their Feudal obligation to constitute the militia of the country. By the side of these semi-Royal "Beys" a smaller class of landowners was developed in the eighteenth century, called "Timarlis." These had nothing in common with the old lords of the soil, "being generally," says M. Debains, "renegades of low extraction, sometimes even Slavs of the Greek Church." They took possession of lands in the plains, which had been ravaged by the passage of contending armies, and left as derelicts by the Christian cultivators on retiring for safety to the mountains. As the old Nobility waned, and the ranks of the Bosnian Beys were thinned, during the wars with Hungary and the Empire, the great Fiefs became extinct with their lords, and the small proprietors rose on their ruins.

A middle-man between the military lord, the "Bey" or the "Spahi," and the tiller of the soil, or "Rayah," was introduced under the name of "Tchiflik Sahibi."* He made himself answerable to the Spahi for the collection of the Tenth, and exacted a tax (the "Tretina," or Third,) from

* Debains, Bulletin, p. 321.

the cultivator for his own profit; assuming, in fact, very much the position of the Zemindar in the plains of Bengal, under the "Permanent Settlement" of Lord Cornwallis.* The Dîme (Deseta), or Tenth, was, as M. Debains observes, a real right, a servitude *Juris Publici*, imposed on the whole country. The Mohammedan Slav, however, was not content with this, and, again like the Zemindar, claimed the ownership of the soil tilled by the Christian, whom he thenceforward considered to be only a tenant. The Tchiflik system, so convenient to the pocket of the Mussulman, spread rapidly, and outside the towns almost the whole land of Bosnia is described by M. Debains as having fallen under the double taxation of the Tchiflik Sahibi. The wonder is that the cultivators should have been able to stand this two-fold burden so long, rather than that they should at last have turned upon their oppressors. The modes of constituting a Tchiflik were very various; sometimes the Rayah sought the protection of a powerful neighbouring Bey, to whom he sold himself to escape the oppression of some Turk; sometimes a Pasha bastinadoed the cultivators of a village into acknowledging him as their Tchiflik Sahibi, as Ali Pasha did with the villagers of Jadar in 1803.† At other times a forced sale took place, and the Bey overran the village, assessing each plot of land at a ludicrously low price, which the Christian Rayah must accept if he wished to save his bones, and perhaps his life. It is hardly surprising to learn that the families of those who suffered in this way have preserved the tradition of these sales, much as the descendants of the Jews and Moors expelled from Granada on the final victory of the "Catholic Kings" Ferdinand and Isabella, are said to have

* Under the "Permanent Settlement," the Zemindars who were really "the class responsible for the payment of the land revenue, and virtually, therefore," as Miss Martineau points out, "the masters of the cultivators and the land, became the proprietors of the soil, but under the restriction that they would not displace any ryot who paid the then existing amount of rent."—(British Rule in India. Smith, Elder, & Co., 1857. pp. 174-5.)

† Debains, Bulletin, p. 322.

still in their possession the keys of their old Andalusian homes.

The wave of Revolution which swept over Europe in 1848 swamped the feudal nobility of Bosnia. Till that time they had continued practically the rulers of their country, of which the entire administration was in their hands. Not without a struggle did they succumb to the centralising of power at Constantinople, after three centuries of virtual absolute sway. They met the first attempts at centralisation by turning out the officials sent from the Porte. Omar Pasha was despatched to quell this first "Bosnian Insurrection," and from this time the doubly powerful class of the lords of the Tithe, and lords of the Soil, disappeared in Bosnia. Then the Porte, fearing lest in its haste to put down insubordination it should have weakened the Mohammedan element in Bosnia and Herzegovina, gave the old lords of the soil, or Beys, the right to the Third (Tretina) of the produce of all possessions which they had enjoyed as Tchifliks, and half the produce of meadow land, on condition that they should pay one-third of the "Porez," or State tax, while the other two-thirds should remain a charge on the Rayah, or Christian cultivator. After a little while, M. Debains tells us, the Musulman lords of Tchifliks contrived that the whole of the State tax should fall upon the Christian cultivator. To any complaints which reached the Porte answer was made that this additional tax took the place of the "corvée," till then exacted from non-Mohammedan peasants. A fresh middleman now arose for the collection of this land-tax, under the name of "Sapuknik," who farmed the Third (Tretina), and collected it from the cultivator. This new officer made friends with the Zaptieh, or Police, and instead of levying the tax in kind took its price as on the day of in-gathering, and pocketed the difference which there might be between that and the price of the day of payment. So the farmer of the Tenth, and the farmer of the Third, have to this day

agreed together to take away the produce of the soil which he tills from the Christian cultivator.

The very collection of the Tretina, or Third, in Bosnia appears, from the researches of M. Debains, to be an abuse, and the Porte has more than once recognised this fact. In 1830 Reschid Pasha suppressed the tax which the Christian tenants paid to their Arnaout lords in Albania, and that without giving the lords any indemnity. In 1832, Prince Milosch obtained the abolition of the Tenth in Servia. The problem of release from this arbitrary imposition is more difficult in Bosnia, because many of the Tchifliks have become in processs of time the subjects of contracts, and there are even, we are assured, rich Christian merchants in Serajewo and Mostar who are owners of Tchifliks. The principle of suppression, therefore, as carried out in Albania and Servia, could not be applied universally, although, as M. Debains remarks, "*if Turkey fulfilled all the conditions of a good government*, the Law might decide that henceforth the owner of a Tchiflik should lose his actual tax in kind, and receive a money compensation which the State should arrange by a system of credit to assist the tenant in paying him." But notwithstanding Midhat Pasha's elaborate Constitution, and notwithstanding the first session of the "Grand Council of the Ottoman Empire," or we might even say in consequence of the fatal flaws in that Constitution, and of the first results of the Council's deliberation, Western jurists and statesmen are hardly likely to accept the Porte as a Power "*fulfilling all the conditions of a good government*." In proof of this we need only refer our readers to a very full and interesting discussion of the present position of the Eastern Question in its relations with International Law from the pen of M. Rolin-Jaequemyns, in a recent number of the "*Revue de Droit International*."*

Perhaps if the Conference at Constantinople had been con-

* *Revue de Droit International*, Brussels, Bruylants-Christophe, 1876, No. II. pp. 293, et seqq.

ducted more on the lines suggested by M. Rolin-Jaequemyns, its chances of success in establishing peace might have been increased. One of the points on which he insists as requiring to be carried out by the Great Powers or their Commissioners, is the abolition of the farming of the taxes, and the reform of the whole system of taxation in the Turkish Empire. What this taxation is in Bosnia, and how it must lie as a deadweight upon the cultivators of the soil, we have endeavoured to shew from the testimony of impartial observers. M. Debains and M. Rolin-Jaequemyns plead, with Count Andrassy, for the restoration to the Bosnian peasant of "the beneficent feeling of proprietorship." It is not much to ask for a long oppressed race, but no amount of Paper-Constitutions can satisfy a demand, which is only a demand for strict justice. What the Bosnian cultivator has seen granted to his more fortunate kinsmen in Croatia and Dalmatia ought to be granted, he cannot but feel, to himself. There have been times when the influence of the renegade nobility of Bosnia at the Sublime Porte was very great, but the most complete outward assimilation of Mohammedanism, although leading them to become devoted and trusted subjects of the Ottoman ruler of the New Rome, seems never to have extinguished in them the feeling of kinship with all members of the Slavonic Family. When Yaroslav Laski, brother of the Reformer, John à Lasco, was at Constantinople, endeavouring to obtain Turkish support to place John Zapolya on the throne of Hungary in succession to Louis Jaghellon, the Slavonic language was as familiar at the Porte as Turkish. The Grand Vizier, Ahmet the Herzegovinian, was a Bosnian, and another Mohammedan Bosnian, Mustapha Pasha, spoke the following remarkable words, which Laski records in his Diary. "We are of the same nation: you are a Lekh (Pole), and I am a Bosnian; it is therefore a natural affection for a man to love his own nation more than another."* In 1528 this feeling

* Krasinski, *op. cit.*, pp. 108-110.

of kinship for a distant member of the race led to the first Turkish siege of Vienna. The writer who draws attention to it in his account of the Slavonians in Turkey, and who is himself a Lekh, affirms his conviction that this feeling of Slavonic brotherhood is stronger than it has ever been. Recent events seem to prove that his conviction, formed more than twenty years ago, was based upon an accurate knowledge of the sympathies of his race, and that it is even more true at the present day.

Meanwhile, we seem, as M. Rolin-Jaequemyns forcibly urges,* to have reached the critical moment when "the world has to learn whether International Law possesses in the Great European Powers an impartial organ, ready to take up what must otherwise appear the hopeless cause of Humanity, Civilisation, and Justice."

VII.—SELECT CASES : SCOTLAND.

By HUGH BARCLAY, LL.D., Sheriff Substitute, Perth.

[The following decisions in the Supreme Courts of Scotland (Courts of Session and Justiciary) involve questions of *general* import, not limited to any peculiarity in Scotch law or practice.]

County Franchise.

(1) A rock or craig in the Firth of Clyde was let for a term of years to two joint tenants at £30 per annum: there was a cottage thereon worth £7 10s. The rock was totally incapable of agricultural occupation. The tenant "had right to shoot, kill, and carry away fowls, goats, and rabbits from the craig." The

* *Revue de Droit International*, ut *supra*, p. 385.

tenants were entered in the Valuation Roll under the 17 & 18 Vic. c. 91, s. 34, as voters at £30 a year, as "joint tenants, land, Ailsa Rock." An objection to the joint tenants' right to vote was sustained by the Sheriff, but reversed by the Judges of Appeal (Lords Ormidale and Craighill), and the vote admitted. The majority held that the Valuation Roll must rule the case. Lord Ardmillan dissented, holding that "the privilege of killing the wild sea birds, which are not game and not property, cannot sustain the claim." Nov. 1, 1875. *Girvan v. Campbell*, 3 Session Cases, 1.

(2.) *Held* under the Reform Act, 1868 (31 & 32 Vic. c. 48, s. 13,) that successive ownership of different premises, but merely *civil* possession during the requisite period, of either property, did not afford a qualification for a vote in a county. The Sheriff sustained the objection, and his judgment was affirmed on appeal. Lord Ormidale regretted the decision, but in respect of the distinction made in the 13th clause of the Act, 1868, he concurred with the other two judges in repelling the claim to vote. Nov. 1, 1875. *Learmont v. Young*, 3 S.C. 5.

Burgh Franchise.

(1.) *Held* that *occupancy* of one house in a burgh, combined with occupancy in immediate succession as *owner* of another house in same burgh, gave a qualification for the burgh franchise when the combined occupancy extended over the requisite period.—Nov. 1, 1875. *Hannah v. Dodds*, 1 S.C. 7.

(2.) A voter was struck off the Roll by the Sheriff, because of non-payment of poor-rates. *Held* that notice of the assessment was sufficient, though no demand note in the form of Schedule C. had been served on him. The Sheriff rejected the claim. The Appeal Judges affirmed his decision.—Per Lord Ardmillan, "The question is - Is the use of the English term, 'demand note,' to introduce any change into our practice, so as to make a new and separate notice necessary? I think not."—Nov. 1, 1875. *Mackenzie v. King*, 3 S.C. 8.

Joint Stock Company, 25 & 26 Vict. c. 89.

A liquidator of a Joint Stock Company in Scotland became resident in England. He asked decree against parties in default of payment of calls. A doubt was expressed if he was entitled to such decree, seeing he was no longer resident in Scotland.—Decree granted.—Per Lord President (Inglist): "If this had been an English Company with an Englishman as liquidator we should

not have hesitated in giving decree against Scotch contributors."—20 Oct., 1875, Robertson, 3 S.C. p. 17.

Extrinsic Evidence to explain a Settlement.

A domiciled Englishman died leaving heritage both in England and Scotland. He left a will in the English form. A special case was submitted to the second division of the Court of Session on the question whether the Scotch estate was settled by the will. Extrinsic evidence was offered in explanation of the testator's intentions. Per Lord Justice Clerk (Lord Moncrieff): "In regard to these writings I think there is a distinction. I do not think that writings *prior* to a settlement have, so far as I know, ever been admitted to construe the words used in a settlement, for very obvious reasons. The declarations of a testator *after* he had executed his deed are of considerably more importance, for he certainly is the man who knew best the meaning of the words he had used, and if the best witness says he meant one thing it is a strong thing for a court of law to say another."—3 Nov., 1875, Farquhar, 3 S.C. 71.

Writ—Subscription to Will.

Held that it did not invalidate the subscription of the maker of a deed that he was assisted by having his hand held above the wrist, but not being led in the formation of the letters. The Lord Ordinary (Curriehill) held the deed to be bad. The Second Division reversed, and *Held* the deed to be good.—Per Lord Ormisdale: "I think you may steady a man's hand provided you do not lead it in the formation of the letters."—Per Lord Gifford: "I can imagine cases in which the Court would easily reach the conclusion that something more than support had been given notwithstanding the disavowal of the person who assisted—for example if there was a discrepancy in the spelling, or the formation of the letters from the granter's usual style." 5 Nov., 1875. Noble v. Noble, 4 S.C. 74.

Railway Act, 1854, (17 and 18 Vic., c. 31, s. 7).

A Railway Company gave consigners of fish the option of having their goods carried at a lower than the ordinary rate for fish, "upon condition of the consigner undertaking by special contract to relieve the Company of all liability for delay, except upon proof that the detention arose from the wilful fault or negligence of the Company's servants." A fish curer despatched two consignments of fish. Both were detained and damaged.

Held that the special contract was "just and reasonable" within the meaning of the Act, and had the effect of throwing upon the pursuer the burden of proving fault on the part of the Company. On the proof, *Held* that in consequence of an intermittent block at a junction, arising from a diversion of traffic caused by a break-down on another Company's line which had taken place a few days before the despatch of the first consignment, fault had been proved against the Company in respect that while the block occasioned the pressure of traffic at the junction, this could have been foreseen. Both Companies had failed to make sufficient arrangements for securing the despatch of perishable goods, and they had not warned the consigner when they received the goods that the line had been blocked, and that the goods were in danger of being delayed in transmission. Per Lord Justice Clerk (Lord Moncrieff) "On the day when the goods were consigned the Company knew they were to carry them by a new and overcrowded line. They were bound to take such measures as were within their power to secure their safe transit by that line quite as much as they were when carried by the former line. They were also bound in the case of perishable goods to carry them in preference to goods not perishable. They were bound either to have taken measures against the delay, if such were in their power, or to have warned the consigner that such was not within their power. I will only add that temporary or accidental detention from unexpected pressure of traffic is a risk incidental to railway transit, and one of which the customers must to a certain extent take their chance. But it is quite a different thing when the causes of probable detention are known and foreseen and are not specifically disclosed to the customers when the goods are accepted." Lord Ormisdale concurred. But Lord Gifford dissented as to the first consignment, but agreed as to the second; as to the first his Lordship thought the failure to stop the fish at the first station was too narrow a ground in the words of the special contract of "wilful fault or negligence."—6 Nov., 1875, *McConnachie v. Great North of Scotland Railway Co.*, 3 S.C. 79.

Bottomry—Powers of Shipmaster.

The Pursuers, a company, commissioned a ship for a Colonial Navigation Company, advanced money on her outfit, appointed a captain, with instructions to take her out to New Zealand and await the instructions of the Colonial Company.

The ship was originally registered in name of the first company, but before sailing she was transferred to a Bank, as security for advances. On her voyage she sustained damage, and was repaired in a foreign port. The Captain granted a Bottomry bond for the advances, and, at the same time, drew bills on the first company for the amount. The Navigation, or Foreign Company, became insolvent. The first company obtained a transfer from the Bank and sold the ship and received the price. They were sued by a party holding one of the master's bills for £250, which they had refused to accept, and which was protested for non-acceptance and non-payment. *Held* that the first company were liable as employers of the Captain, having control of the ship at the time of the repairs and virtually were the owners, and their liability was not affected by the Bond which a majority of the Court held was invalid, because not made contingent on the safe arrival of the vessel at its destination. The action was brought in the Sheriff Court, at Glasgow. The Sheriff Substitute found and decerned for the Pursuer. The principal Sheriff affirmed. The case was then appealed to the Court of Session, and the Sheriff's Judgment affirmed. Per Lord Gifford, "It is not necessarily the person whose name is on the Register who is to be regarded as the owner, but the person who has the real control of the ship, and from whom alone the captain derives his authority." His Lordship quoted Lord Tenterden on Shipping. "I have very clearly come to the opinion that the granting of the bond, be it what it may, does not affect the liability which the defenders incurred for the necessary, the indispensable and the beneficial advances sued for. The Bond is not in the legal and strict sense a bottomry bond at all. It is expressed *absolutely* and without any contingency but made absolutely payable in thirty days and no maritime risk is mentioned upon the occurrence of which the bond and bills would be void." Lord Ormidale concurred with Lord Gifford. Lord Justice Clerk (Moncrieff) agreed on the judgment of the other two judges, but was of opinion that the Bottomry Bond was valid because, it being admitted "that the master being in a foreign port could not otherwise have obtained the money necessary to enable the vessel to proceed, the form of expression of the instrument ought to receive the more liberal construction, and technical objections are not to be favoured." In the discussion and opinions of the Scotch Judges, English decisions were quoted and chiefly relied on.—9 Nov., 1875. *Miller and Co. v. Potter, Wilson and Co.*, 3 S.C. 105.

Property—Minerals—Mining Operations.

In an action brought by one mineral tenant against another adjoining tenant under the same proprietor, for damage done because of water flowing into the Pursuer's mine from the Defender's workings; *Held* (1st) Defender was not liable for the *natural* drainage of his, the Defender's, mine; (2nd) nor for water arising from dislocation of drains and subsidence of surface arising from defender's operations; and (3rd) The Pursuer was in fault because he had, though with the Landlord's permission, removed a natural barrier of coals between the mines, which would have prevented the flow of water complained of. Numerous English Decisions were quoted and relied on —8 Jan., 1876. *Wilson v. Waddell*, 3 S.C. 288.

Reviews of New Books.

First Platform of International Law. By SIR EDWARD S. CREASY, M.A., Professor of Jurisprudence in the Hon. the Four Inns of Court; late Chief Justice of Ceylon; Emeritus Professor of History in University College, London; sometime Fellow of King's College, Cambridge. John Van Voorst, 1876.

Under this quaint title is introduced to the world the fruit of much thought in a branch of the Science of Jurisprudence very necessary for the Statesman and Politician, and scarcely less necessary for the law student who aspires to become a Jurist. Of the wealth of research and citation with which the subject is treated it may be enough to say that it is characteristic of the author. From Solon and St. Paul, from Cicero and Lord Bacon, from St. Thomas Aquinas and Sir Walter Raleigh, as well as from all the best writers of ancient and modern times who have laid down or interpreted the Principles and the Rules of the "*Jus inter Gentes*," Sir Edward Creasy draws something germane to his purpose. In stating this purpose to be the supply of a sound foundation, and a duly arranged framework, the general limitations of the book are at the outset defined by its author. In any case, therefore, in which we may find ourselves wishing that Sir Edward had been more full in his treatment, we must bear in mind that his chief aim was "to teach principles," rather than to explain their details. Of the twelve chapters into which the book is divided, the first seven may be classified as introductory, containing "*notions générales*" on the subject, while the pith of the matter is to be found in the last five chapters, and in the "*Epilegomena*," on the "*Privileges of Public Ships in Foreign Ports*," and on "*International Arbitration*."

Space will not admit of our touching upon more than a few of the many points which we might usefully discuss in a review of the work before us. The author of the "*First Platform*" has made a liberal use of the labours of his predecessors, but wherever Sir Edward Creasy speaks in his own person, he appears to us, whether we are in any particular instance able to agree with him or not, to be generally moderate and judicious in his views,

holding the balance with great impartiality between the often very conflicting doctrines of the older and later schools of International Jurists and Text writers. We are sincerely glad, and we suspect most students of Jurisprudence will share in our satisfaction, that Sir Edward abandoned the use (save in marginal notes) of the fearfully and wonderfully made compounds, "Jus Law," "Lex Law," and "Mos Law," with which he at one time intended to startle his readers. They would, we can scarcely doubt, have proved "white elephants" to their learned inventor.

Of the value of the Utilitarian principle, when rightly apprehended, Sir Edward Creasy is, like Austin, fully persuaded, holding with Cicero, that the "*Honestum*" and the "*Utile*" are coincident. But it does not seem easy to make them agree in some points of the modern doctrine as laid before us from the writings of Bluntschli, Calvo, and other living Publicists. The case of the arrest of certain officers of H.M.S. *La Forte* by the Brazilian military authorities at Rio Janeiro ("Platform," p. 192) appears to us, notwithstanding the award of the King of the Belgians, a weak one to quote in proof of the view that the privilege of extritoriality "does not extend to misconduct committed on shore." Unfortunately, Sir Edward cites the case only from a South American writer, Calvo (*Droit International Théorique et Pratique*, I., p. 794), whose account is meagre and one-sided, instead of from Ortolan's far more impartial and detailed account in the first volume of his "*Diplomatie de la Mer*," (pp. 431-444). We happen to have studied this case carefully, and must confess that we cannot consider it one upon which any judgment can be formed as to the course which ought to be pursued by the authorities of a State within whose territory the officers or men of a Public Ship of War may "misconduct" themselves. We trust that Sir Edward will add a reference to Ortolan on this case in future editions of his work.

Some of the questions touched upon in the present volume were discussed under Sir Edward Creasy's presidency at the Brighton Congress of the Social Science Association, and we are somewhat surprised that he does not quote the most recent cases in which the responsibility of a State for the "satisfaction" to be accorded by its Penal Laws has been the subject of rather sharp diplomatic correspondence. Bluntschli's language on this point is very strong, and it seems to embody the principles upon which the Imperial German Chancery has already acted in regard to Belgium, and would act again, probably, in any case where it thought itself sufficiently strong to insist upon the

modification of the Municipal Laws of a weaker State to bring them into harmony with its own conceptions of International obligations. For it is clear that Germany, at least, does not think of States what the Roman jurists thought of their ideal "Pater-familias;" "*incredibile est in aliquo facile errasse.*"

To the judgments delivered in the "Alabama" Arbitration, and therein more especially to that of the Lord Chief Justice of England, Sir Edward Creasy makes a deservedly constant reference. It appears to us that Mr. Adams, for the purposes of his special pleading, attenuated the privileges of diplomatic representatives in his arguments at Geneva, to a degree which would be probably strongly resented by the United States if the views expressed by him were to be carried to their legitimate conclusion. And the question of origin, in regard to a vessel claiming to be a public ship of war of an organized political society, seems to us a dangerous one to entertain, as well as wide of the true issue, which is whether it be duly commissioned by a properly organized society, having a right to be considered a belligerent. In the days of our warfare against the France of the First Republic and Empire, we transferred to our own Navy List ships which had been built for, and originally commissioned by, the French Government, but had been captured by us in the course of engagements at sea. Is it to be contended that there was a taint of "original sin" about our acquisition of these vessels, and that they never lawfully passed into our service? It is difficult to construe the arguments of Mr. Adams in a sense that shall not be at least patient of such a *reductio ad absurdum*.

The very important question of the extritoriality of public ships of war in the waters of a foreign State demands a few words from us in this place, although we might be contented to leave it in the position which it has made for itself in our own pages, under the lucid and exhaustive treatment of Sir Travers Twiss. The subject necessarily comes up for discussion in the body of Sir Edward Creasy's work, and it also forms the most valuable and interesting part of his "Epilegomena."

Four of the Geneva Arbitrators gave it as their verdict that this privilege was "not an absolute right, but solely a proceeding founded on the principle of courtesy and mutual deference between nations." The point which those Arbitrators seem to have chiefly had in view was the liability of the privilege to be "cancelled at any moment without cause for offence being given." (Judgment of Count Sclopis, "Platform," p 184.) We have not such an opinion of the angelic meekness of human

nature, whether exhibited by individuals or States, as to believe that such a sudden withdrawal of a long unquestioned privilege would not give cause for offence.

In his "Epilegomena," Sir Edward argues that "as a case of privilege all these difficulties that have been raised against the full allowance of the immunities hitherto generally supposed to belong to war-ships, vanish at once out of existence." We regret to be unable to accept this easy solution. Sir Edward insists that "privilege may always be waived by the person for whose benefit it was introduced," and cites from the Lord Chief Justice's Geneva judgment the maxim "*Unusquisque potest renuntiare juri pro se nato*." But, in the case under consideration, the privilege of extritoriality attaches to the public ship of war as representing the sovereignty of the nation whose flag floats over it, and we find ourselves quite unable to conceive that it should be within the power of the captain of such a ship to waive one iota of the privileges of the State which he represents, without direct orders to that effect from those who commissioned him. And in that case it would be the State, and not the captain of the man-of-war, which would make the concession, "pro hac vice," if there appeared to be adequate reasons to do so, owing to special circumstances of time or place. We cannot but think that a commander of a public ship-of-war, who should take it upon himself to yield any such point without authorisation, would find a court-martial awaiting him on his return home, whether the privilege waived related to the honours to be paid to the war-flag of his country, or to the right of asylum afforded by it; and that whether it were in question for the ex-President of a South American Republic, or only for a fugitive slave, who had heard that the British flag would give him liberty, and raise him from the position of a chattel to the status of a free man.

We fear that the interest with which we have followed Sir Edward Creasy's arguments, even where we could not agree with him, has already betrayed us into exceeding the limits within which the inexorable demands of space must warn us to confine ourselves. There are yet many words which we would fain say, and many points to which we would fain draw attention. Scattered up and down the 700 hundred pages of the "Platform," there are not a few antinomies which, no doubt, Sir Edward will reconcile in a future edition. Some of these are curious, such as the passages in which the phrase "now" is used in relation to a time denoted in brackets as 1875. Still more curious is the way in which President Woolsey oscillates between bearing his

proper title, and that of "Principal;" and the sporadic manner in which recognition is made of the rank of Sir Travers Twiss. Even Sir Robert Phillimore appears sometimes as "Dr. Phillimore," while M. Laboulaye and M. St. Marc Girardin are singularly disguised under the names of "Laboulage," and "Girandin." Of these, and similar slips, we can only say, "*dormitat bonus Homerus*." It is a more serious fault, we think, that Sir Edward should have printed only the English text of the Declaration of Paris, 1856. The French text is the authentic one, and Sir Travers Twiss pointed out, at a recent meeting of the Law Amendment Society, some important consequences which flow from the language employed in that Text, and which cannot be understood without study of the original. "La Course," according to Sir Travers, is not what we mean by the word Privateering, but warfare under letters of marque, granted by a belligerent to any person who would accept them, whether neutral or belligerent. It is evident, therefore, that we must study closely the meaning of the French, and not of the English, Text of this celebrated "*Pièce Diplomatique*."

These and other requirements, which we have felt bound to notice, can easily be supplied in a new edition; and, in the meanwhile, we have reason to be grateful to Sir Edward Creasy for a volume which by its fertility of illustration, its elegance of diction, and the general soundness of its doctrine, deserves to become a favourite guide to the student, and a "*Lucerna Juris Gentium*."

An Exposition of our new Judicial System and Civil Procedure as reconstructed under the Judicature Acts. By W. F. FINLASON. Longmans, Green, & Co. 1877.

The numberless editions of the Judicature Acts which we have from time to time been called upon to notice have been editions, strictly so called, and nothing more. They have given us the original enactments of the legislature, illustrated by so much of the old practice as was available for the elucidation of the new, and arranged according to the editor's best notion of convenience. Mr. Finlason's treatise deals with the entire Judicature as a working unit. "The object of the work," he says, "is to explain the broad principles and main provisions of the Acts, and their practical effect and operation, and especially to exhibit the necessary connection between the different parts of the subject; and, above all, to show how all the principles which govern every part of procedure, down to its most particular details, emanate

from a few general principles—the governing principle of all being the necessity for the adaptation of judicature and procedure to the nature of the jurisdiction to be exercised in different classes of cases; that is, the judicial business to be discharged, or the judicial work to be done. Thus it is that the whole subject turns upon the nature of the jurisdictions to be administered, which necessarily governs the nature of the judicature as the judicial power to be employed—as the nature of the work to be done dictates the agents to be employed.” This, it will be observed, is a complete vindication of the Judicature Acts, all the more timely that they are now passing through a storm of criticism, raised chiefly by those who declined to offer their counsel when the Bills were before Parliament.

Nothing would give more satisfaction to the lay public than to be assured on competent authority that the great principle of division of labour has been successfully carried out in the Supreme Judicature of the land. That there was no such principle in the old system; that there were too many workmen in one shop, and too few in another; that their work was not distributed on any business-like principles, but, to a large extent, as the result of historical accidents; and that instead of co-operation, we had opposition, one set of workmen being employed to prevent or undo the work of another—such was the burden of complaint, raised first of all by lawyers who cared about reform, and mournfully repeated by those who knew little or nothing about the matter. On the other hand, the impression now prevailing as to the operation of the Judicature Acts, is that things remain pretty much as they were. The marvellous consolidation of all the old Courts into one, followed by the re-distribution of the business to the old Courts under the old names, is beginning to strike people as a piece of legislative jugglery. It would be highly satisfactory, therefore, to know that the net result after all, is this “necessary adaptation of judicature and procedure to the nature of the jurisdiction,” of which Mr. Finlason speaks. But, when we turn to the chapter in which Mr. Finlason discusses the necessary differences of jurisdictions, we are doomed to disappointment. Mr. Finlason gives us no principles by which we are to distribute our judicial business. In distinguishing between jurisdictions, he appears to hesitate between the nature of the right, and the nature of the remedy, as the deciding test. He is successful in pointing out that special jurisdictions—like Criminal and Divorce jurisdictions—are separable from the rest, and must be exercised by separate

tribunals But we do not think he is successful in showing that Chancery jurisdiction, as it has been left by the Acts, is a special and separable jurisdiction of this kind. On this point he almost takes up the old position maintained by the opponents of the Judicature Acts, that Law and Equity are essentially different in nature, and must be kept distinct. Mr. Finlason is on the right track in trying to find in the peculiarity of the subject-matter a reason for the separation of jurisdictions, but, in the important instance of the Chancery Division, we do not think he has succeeded.

Mr. Finlason thoroughly approves of the settlement of the Appeal question effected by the Act of last Session—a settlement which he evidently looks upon as final. He has no patience with those who say that the highest Appeal Court is not really the House of Lords; such an objection he denounces as both fallacious and futile. Futile it may be in the sense that if we get a good Court, it really matters nothing what it may be called; but the fallacy, we should have thought, is all on the other side. The objection was only made in answer to those who insisted that the House of Lords ought to remain the Imperial Court of Appeal; and to these it was surely relevant to say, “After all, what you have got, is not the House of Lords at all.” There may be something in Mr. Finlason’s plea, that the name will give the new Court a dignity which it would not otherwise possess in the eyes of the vulgar, and that the dignity will be an inducement to the best lawyers to accept seats on the bench. We should prefer to think, that a seat in the highest tribunal of the Empire, cannot be raised in public or private estimation by a nominal connection with the hereditary branch of the Legislature. But surely Mr. Finlason is going too far, when he asserts that the excessive greatness of the position will be a new guarantee for the fitness of the appointments to high judicial office. And can he really be serious in citing Lord Gordon’s appointment as an example?

We shall not attempt to follow Mr. Finlason through all the questions which are raised and discussed in this vigorous volume. His knowledge and his fairness are alike beyond question, and if his argument generally fails, as we think it does, at the point where it touches the *rationalis* of judicial institutions, it supplies us, at all events, with a rough and ready estimate of the working merits and defects of the last great improvement. The chapter on the history of the subject is, perhaps, the most interesting in the book. Many who have been frightened by the crushing

novelty of the Judicature Acts, will be pleased to learn that all their important provisions have attained quite a venerable age as proposals for reform.

The Statutes, General Orders, and Rules of Court relating to the Practice, Pleading, and Jurisdiction of the Supreme Court of Judicature, particularly with reference to the Chancery Division and the actions assigned thereto. Fifth Edition. By GEORGE OSBORNE MORGAN, M.P., Q.C., and CHALONER W. CHUTE, of Lincoln's Inn, Barrister-at-Law, late Fellow of Magdalen College, Oxford. Stevens & Sons. 1876.

The fifth edition of Morgan's *Chancery Acts and Orders* is not merely a new edition of an old and highly-esteemed treatise, but to a considerable extent a new work. The provisions of the Judicature Acts and Rules retaining in force the old forms and methods of procedure, so far as they are not inconsistent with the new practice, have rendered it necessary to perform the difficult and delicate task of disentangling the mass of operative Orders and Regulations from those which have been either expressly or inferentially abolished. This task has been accomplished by the learned authors with great care and discrimination; and the practitioner will find in the present edition, a lucid and compendious statement of the substance of the Consolidated and other Orders of the Court of Chancery, which, though not expressly incorporated in the new enactments, are, by implication, left untouched by them, placed side by side with the Judicature Acts and Rules of Court. As a minor point, but one which greatly facilitates the convenience of reference, we note that the older Orders and Regulations are distinguished by italics, while the Rules of Court applying to the Divisions of the High Court other than Chancery, are printed in smaller type. The Rules relating exclusively to the Probate and Admiralty Divisions have been omitted altogether, and the volume is judiciously kept within such limits that it can be conveniently carried into Court. In addition to the Judicature Acts and Rules many important Statutes passed since the last edition appeared, such as the Settled Estates Act Amendment Acts, 1874 and 1876, the Partition Act, 1876, and the Appellate Jurisdiction Act, are added to the collection of Statutes forming the first part of the book. The copious notes interspersed amidst the Statutes and Rules are always to the point, and will be found to contain the pith of all the numerous recent cases. We entertain no doubt that this

new edition will maintain and enhance the high reputation deservedly gained by the original work.

A Concise Treatise on the Statute Law of the Limitation of Actions. By HENRY THOMAS BANNING, M.A., of the Inner Temple, Barrister-at-Law. Stevens & Haynes. 1877.

Mr. Banning is a new writer, and his first book is to be commended as a careful, and, we think, successful attempt to exhibit the whole of the Law relating to the important subject of Limitations in one moderately-sized volume. The subject has, in England at least, been treated as if it consisted of two entirely separate subjects; and so far, therefore, the general policy of the Law has been obscured. It is a healthy feature of recent legal literature, that the scientific is gradually superseding what may be called the forensic arrangement—the arrangement suggested by the casual wants of the practitioner. Mr. Banning's book on Limitations is a study of the operation of the principle throughout the entire domain of the Law. A student, who has mastered the elements of the Law, and is in search of a special subject for detailed study, could not do better than choose Mr. Banning's book. We offer this recommendation the more confidently, as it has the not very common merit of being readable. Mr. Banning has made no attempt to avoid technicalities of expression; indeed, as he tells us in the preface, he has sought to use, as often as possible, the *ipsissima verba* of the tribunals. But he has produced his effect, mainly, as it appears to us, by the judicious shortness of his chapters, and by the continuous method which runs through them all. Each separable head has a chapter to itself, which one masters with a sense of ease, and each new chapter marks a distinct advance in the line of argument. The result is what must be pronounced an interesting law-book. Here and there one might suspect traces of a grave humour, but the humour is so very grave that it is probably unintentional. Such, for instance, is the case in which Vice-Chancellor Shadwell is solemnly quoted as referring for a legal principle to "the Holy Scriptures and the decisions of our own Courts of Equity," and citing authorities from St. Matthew's Gospel and the poetry of Ovid. Probably Mr. Banning meant nothing more than to give the *ipsissima verba* of the learned judge, just as he is probably following a marginal note, when he records in one case that the

defendant was a Quaker; a fact in no way relevant to the decision, but explanatory of the peculiar language of the correspondence.

The references to American cases and to the French Code, are not so copious as one might be led to expect from the promise on the title-page. Mr. Banning has not sought light from foreign systems. He does not, like the mutilator of Lord Macaulay's speeches, find the principle of Limitation in "the Pandects of Benares." But, within the limits he has assigned to himself, he has to the best of our judgment thoroughly explored his subject. Our examination of the book enables us to endorse the modest statement of the author, that the work has been one of much labour.

The only fault we have to find with the book, is the occurrence here and there of obscurities and oddities of expression. Take the following as an example:—"It may be, however, that there is a distinction, as suggested by Justice Story in his Conflict of Laws, and as suggested in reference to the preceding rule, in cases where the right as well as the remedy of the claimant is barred by the law existing at the place of contract." It is hardly fair to quote the sentence apart from its context, for which we have not room; but, after a careful study of the context, we feel pretty sure that it would take a good many lines to explain the whole of Mr. Banning's meaning.

The Law of Parliamentary and Municipal Registration; with Notes, useful Tables, and the most important decisions given in appeals from Revision Courts; together with the proposed alterations in the Law. By ALEXANDER CHARLES NICOLL and ARTHUR JOHN FLAXMAN, both of the Middle Temple, Barristers-at-Law. Knight & Co. 1876.

Among the many measures of greater or less merit which the ever-increasing pressure of business in Parliament prevented from passing into laws last Session, the "Parliamentary and Municipal Registration (Boroughs) Bill" introduced in the Commons by Mr. A. G. Marten, Q.C., M.P., was by no means the least important. It was intended to effect a considerable change in the system of making up and publishing the Parliamentary and Burgess lists of such boroughs as are both parliamentary and municipal, facilitating the work of the officials, simplifying the law, and procuring a saving of expense which has been approxi-

mately estimated, in the case of a single large borough, at no less a sum than £800 a year. The Bill had already passed twice through Committee before its withdrawal, and we trust that Mr. Marten will reintroduce it in the coming Session, with a more fortunate result.

The arrangement of the book now before us was decided upon by the authors while Mr. Marten's Bill was before the House, and when there was every probability that it would become law. The authors speak of Parts I., II., III., and even IV., but in the body of the work this numeration is not to be found, which is a drawback in respect of readiness of reference. But it must be noted that even should Mr. Marten's Bill become law it will not affect at all what Messrs. Nicoll and Flaxman call Part I., viz., the Law of Registration applicable to Counties, while Part II. will apply to Boroughs Municipal alone, and Part III. to Parliamentary Boroughs only. The existing Law is well and concisely set out, and the work is so arranged that it may be used with advantage even if Mr. Marten's Bill should take its place among the achievements of a Parliamentary Session yet to be held. The Tables compiled by the Authors to shew the stages and dates of the various duties of Registration Officers in Counties and Boroughs add considerably to the value of this handy little book.

Manual of the Prevalence of Equity, under the 25th Section of the Judicature Act, 1873, amended by the Judicature Act, 1875. By CHARLES FRANCIS TROWER, Esq., M.A., of the Inner Temple, Barrister-at-Law, late Fellow of Exeter College, and Vinerian Law Scholar, Oxford. Butterworths, 1876.

We congratulate Mr. Trower on having produced a concise yet comprehensive treatise on the prevalence of Equity under the 25th section of the Judicature Act, which cannot fail to prove of great service alike to the student, and to practitioners of the Common Law Branch of the profession who, under the recent legislation, find themselves called upon probably for the first time to study, and apply in practice, the equitable principles which now "prevail." Within the compass of less than a hundred pages (including the Index), the author has contrived to compress the results of extensive reading combined with practical knowledge, the whole being logically arranged, and expressed in clear and terse language. Each proposition is verified by reference to sufficient authority; but, to quote the author's words, "as a

multiplicity of authorities, like time-pieces in a clock-maker's shop, tends only to distract," single cases only are, as a rule, cited, or some good text-book which has collected the cases. To facilitate reference, the particular pages of such judgments as establish an important position, are given in the notes.

On the Compulsory Purchase of the Undertakings of Companies by Corporations, and the Practice in relation to the passage of Bills for compulsory Purchase through Parliament. By J. H. BALFOUR BROWNE, of the Middle Temple, Barrister-at-Law. Stevens & Haynes. 1876.

This little treatise, from the prolific pen of the learned Registrar to the Railway Commissioners, consists chiefly of a condensed report of the proceedings before the Committees of the Lords and Commons which passed the "Stockton and Middlesborough Corporations Water Bill, 1876." Parliament having sanctioned the compulsory purchase by these corporations of the works of the local water company, notwithstanding its most strenuous opposition, there can be little doubt that many other such transfers will be sought and obtained; for there certainly exists a growing feeling that as a rule it would be for the public advantage that the trust to supply water—and also gas—should be vested in the local or municipal authorities. As regards the supply of water, this tendency is strongly marked in the provisions of the 52nd section of the Public Health Act, 1875. Both to corporations wishing to acquire the works of companies which supply gas or water within their districts, and to companies anxious to retain the monopoly which they at present enjoy, Mr. Balfour Browne's compendious exposition of the facts of a case, "in which the principle of compulsory purchase was, for the first time, definitely recognized and given effect to," cannot fail to be interesting and useful.

The Law Relating to Public Health and Local Government, as contained in the Public Health Act, 1875, and other Statutes; with an Introduction, Notes, and Appendices. By GERALD A. R. FITZGERALD, M.A., of Lincoln's Inn, Barrister-at-Law, late Fellow of St. John's College, Oxford. (Stevens and Sons, 1876).

Though somewhat late in the field, Mr. Fitzgerald has the special recommendation, as a writer on the Law relating to Public Health and Local Government, that he was employed by

the Government in the preparation of the admirable Consolidating Statute of 1875. Two introductory chapters are devoted to a historical summary of Sanitary Legislation in England, and to a lucid explanation of the provisions of the Act of 1875, in which particular attention is called to the amendments of the old law introduced amidst the work of consolidation. The Act of 1875 is given *in extenso*, with intersectional cross-references, and notes in which all important cases decided on corresponding sections of former statutes are referred to, and wherever possible the definite proposition of law embodied in a case is tersely stated. The incorporated provisions of the Waterworks' Clauses Acts, the Towns Improvements Clauses Act, the Towns Police Clauses Act, and the Markets and Fairs Clauses Act, follow the principal Act. In an Appendix are given the Audit Clauses of the Poor Law Acts applicable to the accounts of rural Sanitary Authorities; the Miscellaneous Statutes referred to in, or relating to the purposes of, the Public Health Act, 1875; various orders issued by the Local Government Board under the Acts relating to the Public Health, &c.; and a chronological table of the "Sanitary Acts," pointing out those which have been repealed. A copious and well-executed analytical index completes the work, which we can confidently recommend to the officers and members of sanitary authorities, and all interested in the subject matter of the new Act.

Select Titles from the Digest of Justinian, edited by T. ERSKINE HOLLAND, D.C.L., Chichele Professor of International Law and Diplomacy, Oxford, and C. L. SHADWELL, B.C.L., Fellow of Oriel College, Oxford, both of Lincoln's Inn, Barristers-at-Law. Part III. Oxford: Clarendon Press. 1876.

We are indebted to Dr. Holland and Mr. Shadwell for a new instalment of their useful publication of "*Select Titles from the Digest*." The idea of illustrating separate portions of Roman Law by a careful recension of the Titles of the Digest containing the Imperial Legislation, and the opinions of the Imperial jurists, on those portions, was itself a happy one, and has been well carried out by its authors. The part now before us, the third of the series, is devoted to Roman Property Law. The student of Civil Law, whether at the Universities or the Inns of Court, will find it very useful to keep by him for ready reference both Part III. and Part II., which gave a conspectus of Family Law. Short English Summaries are prefixed to each Title, shewing

where the chief points are to be found, and references to other portions of the Digest and Code are given in foot-notes. We only wish that Messrs. Holland and Shadwell had not thought it necessary to adopt the modern German fashion of printing "u" for "v," and "i" for "j," which may be neo archaic but is eminently uncomfortable.

A Key to Story's Equity Jurisprudence. By R. S. GUERNSEY, of the New York Bar. New York: Diossy & Co. 1876.

Mr. Guernsey may, in some respects, be considered an American cousin of Mr. Indermaur. Both stand high in the favour of Law Students in their respective countries; but, while Mr. Indermaur concerns himself chiefly with passing the student through an Examination, Mr. Guernsey has the higher aim of enabling those who use his book to attain an enduring knowledge in the branch of Legal Science with which he deals, not by a "royal road," but by "their own industry and perseverance." This is an excellent object, and Mr. Guernsey's treatment of Story's book seems well calculated to attain it. While offering the student more than eight hundred questions to test his knowledge of the work analysed, Mr. Guernsey so frames his "Key" that it shall present an outline of the entire system of Equity Jurisprudence, to be filled up, at will, by notes from Spence, Smith, and other standard writers. The references to Story are only to the chapters and titles containing the subject, the student being thus obliged to refer to the original for the pages and sections in which it is treated. Though primarily intended for the Law Schools of the United States, Mr. Guernsey's book is equally adapted for the use of the English student who wishes to make himself master of the general principles of Equity Jurisprudence.

Revue de Droit International et de Législation Comparée, publiée par MM. ASSER, ROLIN-JAEQUEMYS, and WESTLAKE. Bruxelles, Bruylants-Christophe. 1876. (Nos. 1 and 2.)

We are glad to learn by the first number for the past year of our able Belgian contemporary, which is the organ of the Institute of International Law founded at Ghent, in 1873, that the desire to do honour to the memory of Alberico Gentili has spread to the Netherlands. M. Asser, Councillor of the Ministry of Foreign Affairs, and one of the Editors of the "Revue," is at the head of an influential committee in Amsterdam. Interesting

details are also given concerning the English and Italian Committees. We trust that England, which received him when his Fatherland sent him into exile, will not be found behind Italy and Holland in shewing her gratitude for the teaching of the Father of International Law in the Schools of Oxford. It is pleasant to find from another part of the "Revue" that a fresh impulse to the progress of Legal and Political Science has been given by the Peruvian Government, which has called M. Pradier-Fodéré, a distinguished French Publicist, to the presidency of a Faculty of Political and Administrative Science at Lima, comprising in a three years' course the study of Administrative and Constitutional Law, Public and Private International Law and Diplomacy, Political Economy and Statistics.

We have drawn attention elsewhere to a valuable article in the second number for 1876.

The Partition Acts, 1868 & 1876; A Manual of the Law of Partition, and of Sale in lieu of Partition. By W. GREGORY WALKER, Esq., Barrister-at-Law, B.A., and late Scholar of Exeter College, Oxford. Stevens & Haynes 1876.

This edition of the above Acts by Mr. Walker will be found a handy little compendium of the Law of Partition, and of Sale in lieu of Partition; comprising not only the new law and practice, but also so much of the old law as still possesses an existing practical value. The two Acts of 1868 & 1876 are illustrated by carefully written intersectional notes, containing references to all the reported cases decided under the Act of 1868. In an Appendix are given several useful forms of Decrees and Orders, extracted by the author from the Registrar's books at the Report office.

Oke's Magisterial Synopsis. Twelfth edition. By THOMAS WILLIAM SAUNDERS, Esq., Barrister-at-Law, Recorder of Bath. 2 vols. Butterworths. 1876.

Twelve editions in twenty-eight years say more for the practical utility of this work than any number of favourable reviews. Yet we feel bound to accord to the learned Recorder of Bath the praise of having fully maintained, in the present edition, the well-earned reputation of this useful book.

The many important statutes passed since the eleventh edition appeared, only four years since, and which either impose new duties upon, or modify the old law administered by, Justices of

the Peace, have been carefully incorporated in the present work. Among these we may notice in the legislation of the last Session alone, the Acts concerning Cruelty to Animals, Drugging of Animals, Elementary Education, Industrial and Provident Societies, Merchant Shipping, the Poor Law, Salmon Fishing, and Wild Fowl Protection. A copious Index of over 100 pages offers every facility for reference which can be desired in addition to the alphabetical and tabular arrangement of offences, with their penalties, punishments, and procedure.

A History of Crime in England. Vol. II. From the Accession of Henry VII. to the Present Time. By L. OWEN PIKE, M.A., of Lincoln's Inn, Barrister-at-Law. Smith, Elder, & Co. 1876.

To those whom previous study may not have familiarised with Mediæval History, and who probably, however erroneously, regard it as an unprofitable period for modern civilisation to concern itself with, Mr. Pike's concluding volume will make a more forcible appeal for attention than his former one. But it is precisely because Mr. Pike has enjoyed lengthened opportunities for making a special study of his subject in the ancient records of this country, and because he is neither a mere "*laudator temporis acti*," nor yet a blind enthusiast in favour of the nineteenth century, unable to discern the mingled good and evil of past ages, that his book is deserving of most careful study at the hands alike of the Criminal Lawyer, the Statesman, and the Economist.

With a work treating of so vast a subject, and in so exhaustive a manner, we cannot attempt to do more than point out a few of the salient features of the volume now before us, and draw attention to some of the more important views propounded or suggested by the author. The range of the book is necessarily very wide, embracing such widely different questions as those raised by the case of Mary, Queen of Scots, the charges against Lord Bacon, the Gunpowder Plot, the Star Chamber, and the most recent theories on Crime and Education. The descriptions given of the various modes of torture employed in this country down to a recent period, form a painful but unavoidable part of the task of the Historian of Crime in England. It may be doubted whether torture is not, in some shape or other, still legal both in Germany and Italy; yet the latter country, at least, displays great anxiety to abolish Capital Punishment. The use of thumb-screws (*pollici*), for the purpose, apparently, of extracting from

a prisoner a confession of being in the wrong in a dispute with Neapolitan boatmen, was clearly proved against Italy in very modern days, and we are not aware that the proof drew forth any disavowal of the system for the future. Mr. Pike may well remind us that the progress of civilisation is very slow, and that it is often but skin-deep. Nations, professedly civilised, no less than those whom they would call barbarians, are very apt to put on a cocked-hat and a pair of Wellington boots, and consider themselves in full dress. It is worth while to remember that the Pillory was in use as late as the beginning of the present Reign, and that Professor Mittermaier could write of his country to an eminent American Jurist, Mr. Bishop, in 1860, "the greatest number of our lawyers neglect the study of the human nature;" and, in still more quaint and forcible language, "in Germany very dangerous principles, viz., that of intimidation, or retaliation, or *imitation of the divine Justice*, have a bad influence."—(Bishop, Criminal Law, I., s. 98. Boston, 1872.) What idea the learned German Professor had formed to himself of "the divine Justice," that its "imitation" should so excite his indignation, we are unable to conceive. Possibly, it was a certain affectation of inerrancy, which is one of the tendencies of the Modern State, and which does not pass unheeded by Mr. Pike. "Our forefathers," he reminds us, "thought they burned heretics for the good of the Commonwealth and for the good of the heretics themselves, just as we think we vaccinate infants, send Peculiar People to prison, and fine widows who permit their children to be absent from school, for the good of the children and of the State in general. We believe we know what is expedient better than a small minority who look upon the same matters from a different point of view." The whole of Mr. Pike's last Chapter, in the course of which he discusses the relations between Crime and Instruction, the effects of Compulsory Education, and some of the various forms of what appears to him to be "Modern Intolerance," is very interesting and suggestive. Sometimes the author would seem fanciful, did we not know that his views are based upon documentary researches, and that he is fully alive to the fallacies which may and do lurk in statistics. We may not be able to agree with Mr. Pike at all points, but his arguments and his warnings are alike worth heeding. We shall do well to remember that a grave responsibility is accepted by a State which insists on directing how the earlier years of life shall be spent by its members. In this phase of modern English life, Mr. Pike sees "a distinct advance towards Communism,"

for the parents of children in receipt of State education, he urges, "receive, if not money, the value of money, out of a common stock." And this policy, he thinks, must go further, or be inconsistent; the reproach of intolerance, at any rate, he believes it can hardly escape.

So Mr. Pike, from his point of view, sounds the Cassandra note of warning. Whether he be right or not in thinking that he has shown us our "rocks ahead," we have much reason to thank him for the able contribution of an original thinker to the solution of some of the chief problems in the Political and Social History of England.

A Sketch of the History of Taxes in England. By STEPHEN DOWELL. Vol. I.—To the Civil War, 1642. Longmans. 1876.

Mr. Dowell here breaks ground in a different kind of literary soil from that with which his name has hitherto been associated. From his more strictly technical works on the Stamp and Income Tax Laws he has aspired to the position of a Historian, and has undertaken to treat an important branch of the story of the English people. For, if it be true that money is the "Sinews of War," no less is it the "Sinews of Peace" and good government. Among the radical evils which appear to render a better administration and an internal reformation of abuses in the Ottoman Empire so hopeless is the wretched state of the Revenue System, and the enormous drain upon the people arising from a Taxation under which Pashas and Middle-men flourish, while the State and the Tax-payer alike derive little or no benefit from it. Under such circumstances discontent must needs be chronic and universal. Mr. Dowell is a historian who thinks a dry subject requires to be made palatable by plums of quotation, and of peculiarly modern illustration. He tells us what Lothair would have paid to enter the lists at Ashby, had he lived in the reign of Richard Cœur de Lion, and gives us as the modern version of the Emperor Sigismund's advice to Henry V. respecting Dover and Calais, "Keep up your Channel Fleet." His range of authorities is wide, sometimes embracing in the same page the prince of old travellers, Mandeville, and Mr. J. R. Green, some of whose most rhetorical assertions he accepts without challenge. Michelet is among Mr. Dowell's most favourite sources of inspiration, and it seems to us that his style has been somewhat affected by the peculiarities of the brilliant French historian, which, like those of Victor Hugo, are apt to seem spasmodic and inflated when translated into English. But our

author has carefully studied his subject, and has something of interest to tell us about it from the "*portoria*" and "*capitatio humana*," of the Western Roman Empire, down to Bates's Case. Several useful tables of mediæval taxation are given, and, besides the statistics of the various periods described, Mr. Dowell affords much assistance to his reader in gaining an insight into the manner of life in England, down to the War between King and Parliament. Looking onwards from 1642, Mr. Dowell sees in the vista of the future a long array of taxes on "almost every document that can bear a stamp, and every trade or profession that can bear a license," so that there can be no lack of matter of interest for his second volume.

The Inns of Court Calendar. By CHARLES SHAW, Under-Treasurer of the Middle Temple. Butterworths. 1877.

The first publication of an "Inns of Court Calendar," modelled to a certain extent on the long familiar University Calendars, can hardly fail to be suggestive to many minds of the oft-mooted idea of a Legal University, with the Four Inns of Court as its component Colleges. And when we look at the details here afforded concerning the professorial instruction given under the Consolidated Regulations, and the rewards in the shape of prizes, studentships, and other distinctions, which may be gained by those who are "*in statu pupillari*," the suggestion seems almost to become the reality which a slight extension of the present system, embracing the appointment of Tutors in each Inn, would go far to make it.

There is a mass of information in this work which both members of the profession, and the lay public, will welcome, and which they would otherwise have to search for in many separate publications. But it is essential to the success which we should gladly see the Inns of Court Calendar obtain, that the next issue should contain an *Index Nominum*. Without this it cannot fulfil its purpose of being a handybook of reference, in which those who consult it may expect readily to find all the information that they desire respecting the dates of admission and call, the official position, and the academical and other distinctions of members of the Four Inns.

On some points there is in the Calendar almost a redundancy of information, as for instance, on p. 225, where the late *Liberal* member for Oldham is described as still sitting and as being *Parliamentary* Secretary to the Local Government Board, con-

trasting oddly with the paucity of the details appended to several well-known and distinguished names. The Almanac, also, is stocked with a variety of curious little facts, more or less connected in some way with the legal profession. But here the want of accurateness in details, which we have to regret in other parts of the Calendar, mars the usefulness of the information offered. We doubt whether Sir William Haslerig and William Strode would recognise their own identity under the strange metempsychosis which has turned them into "Hasebrig" and "Stroud," any more than the admirers of the late Sir John Patteson and John Wilson Croker could identify their fame with the odd distortions, "Patterson" and "Crocker." Small errors in a man's name, Mr. Shaw should remember, are ranked by the Stagirite among the causes of anger.

A Treatise on Crimes and Misdemeanors. By SIR WILLIAM OLDNALL RUSSELL, Knt., late Chief Justice of Bengal. In 3 vols. Fifth Edition. By SAMUEL PRENTICE, Esq., Q.C. Stevens & Sons. 1877.

However much the practitioner may groan under the weight of the ever-increasing mass of decided cases on every branch of the Law, and long for the time when

"That codeless myriad of precedent, that wilderness of single instances,"

shall be reduced to the definite and authoritative exposition of a Code, it is absolutely essential for him, while the Law remains as it is, to possess treatises such as "Russell on Crimes," vast though their dimensions be. The three portly volumes before us treat, indeed, of indictable offences only, and the law relating to the summary conviction of offenders, scarcely less bulky in its proportions, must be sought elsewhere. But, on the subject of Indictable Offences, it has long been generally admitted that no more trustworthy authority or more exhaustive expositor than "Russell" can be consulted. The high reputation gained by the work in its original form, and under the editorship of Mr. Greaves, will, we venture to think, be fully maintained under the careful hands and discriminating judgment of Mr. Prentice. The original plan has for the most part been, wisely as we believe, adhered to. The work is divided into six Books, treating respectively : I. Of Persons capable of committing Crimes, of Principals and Accessories, and of Indictable Offences. The first chapter of this Book, on "General Provisions," has

been expanded to over 100 pages by the present editor, who has judiciously grouped together in it various general provisions, which in the Fourth Edition were unsystematically scattered. Thus, *e. g.*, "Pleas of autrefois convict and acquit," and "Amendment of Indictments at the Trial," were formerly inserted under the titles, "Burglary" and "Evidence." Book II. treats of offences principally affecting the Government, the Public Peace or the Public Rights; from which, however, the crime of High Treason is, as in all previous editions, excluded. Book III., which concludes the first volume, is devoted to Offences against the Persons of Individuals; the titles, "Bigamy" and "Libel," having been relegated to Book V. in the third volume, in order to keep the size of the first within convenient limits. Book IV. occupies the whole of the second volume, and gives an exhaustive exposition of the law of Offences against Property, public and private. The third and concluding volume comprises Book V. on Offences which may affect the Persons of individuals or Property; and Book VI., containing a treatise on the Law of Evidence in Criminal Prosecutions, originally written for the second edition by the late Mr. Justice Vaughan Williams, when of only two or three years' standing at the Bar. Tables of Cases, and of the principal Statutes cited, as well as a separate Index (irrespective of the General Index) accompany each volume, which may thus be said to form a complete treatise in itself on the branches of Criminal Law comprised within its limits.

SMALLER BOOKS AND PAMPHLETS.

We have received two of Mr. Gerald A. R Fitzgerald's carefully edited manuals, *The Ballot Act, 1872*, 2nd edition (Stevens and Sons. 1876), and the *Rivers Pollution Prevention Act, 1876*, (Stevens & Sons. 1876). The former will be a useful guide to all concerned in Parliamentary and Municipal Elections, and the latter is a well timed addition to the author's previous work on Sanitary Law. Both are fully indexed. In *Old Words and Modern Meanings* (Longmans, 1876), Mr. Whitcombe Greene gives us a curious medley of passages illustrating changes in our use of words, which may be advantageously consulted by the aspirant to forensic honours. But the quotations chosen do not

always seem to bear out the meanings assigned by the compiler to the words which they illustrate, and notably so, the extract from Tillotson on "Eternity."—Mr. Hamel, Solicitor for Her Majesty's Customs, has produced a very useful "pocket volume" edition of *The Customs Laws and Tariff Act*, 1876, (Butterworths, 1876,) for which his official position afforded him unique facilities, and which ought to be in the hands of all who have an interest in our maritime commerce.—Mr. Maclachlan's reprint, in a separate form, of *The Merchant Shipping Act*, 1876, (W. Maxwell & Son, 1876), will also be useful to the same class. Mr. W. D. I. Foulkes has made a valuable addition to the literature of the Judicature Acts, in his new recension of *Smith's Action at Law*. (Twelfth edition. Adapted to the Practice of the Supreme Court. Stevens & Sons. H. Sweet. W. Maxwell. 1876.) A judicious system of compression has enabled the editor, without sacrifice of clearness, to bring the volume within a very portable compass.—Mr. A. C. Eddis has been induced, by a consideration of the consequences of the prevalence of the Rules of Equity under the new system, to bring out an edition of the *Rule of Ex parte Waring*, (Stevens & Sons. 1876.), which has a direct bearing on the important subject of the Law of Bills of Exchange.—Mr. T. W. Braithwaite offers a happy combination of things new and old in his recent edition of *Oaths in the Supreme Court of Judicature*, (Stevens & Sons, 1876,) which will be specially useful to Commissioners.—Mr. Ezekiel Petgrave, who states himself to be a "Proteus as regards criticism," has applied the knowledge derived from long practice as a solicitor to the production of a *Code of the Law of Principal and Agent*, (Stevens & Sons, 1876,) of which we may say, without attributing to its author "the abilities and application of a Tribonian, a Pothier, and a Story," that it is an essay worthy of being read by all who are interested in the great question of the Codification of English Law, a subject on which the author appears to entertain some peculiar views. How far our Transatlantic cousins have advanced in the direction of Codification is pointed out, with many other interesting particulars, by Mr. W. D. Downie Stewart, Barrister of the Supreme Court of New Zealand, in a Lecture on *English and American Law* (Dunedin, N.Z. 1876)—Mr. G. M. Wetherfield puts in a clear form *Hints on County Court Practice* (Crosby Lockwood, 1876), which may be found useful by solicitors.—Sheriff Barclay, of Perth, sends us two pamphlets, in which he deals respectively with the New Sheriff Courts Act, 39 & 40 Vict. c. 70 (*Notes on Sheriff Courts*; Edinburgh, T. & T.

Clark, 1876), and with an important question in the Ecclesiastical Law of the Scottish Establishment (*Judicial Procedure in Presbyterian Church Courts*, William Blackwood & Sons, 1876). In the former the Sheriff points out the evils which the new Act was intended to remedy, while in the latter he hits several blots in Presbyterian Ecclesiastical Law, and pleads for speedy reform in the Procedure of Church Courts.

Books Received.

We have to acknowledge the receipt of the following :—

- Robson's Law and Practice in Bankruptcy.* Butterworths. 1876.
Boyd's Merchant Shipping Laws. Stevens & Sons. 1876.
Theobald on the Construction of Wills. Stevens & Sons. 1876.
Fraser's Scottish Law of Husband and Wife Vol. I. 2nd Edition. T. & T. Clark. 1876.
Colin's French Intestate Successions. Stevens & Sons. 1876.
Essays on Anglo-Saxon Law. Macmillan & Co. 1876.
Geffcken's Church and State. Translated by E. Fairfax Taylor. Longmans & Co. 1877.
Revised Statutes. Vol. XI. Eyre & Spottiswoode. 1877.
England and China. By Justum. James Bain. 1877.
Ball's Popular Conveyancer. Butterworths. 1877.
Locock Webb's Supreme Court and House of Lords Appeal Practice. Butterworths. 1877.
Die Vorbereitung der Mündlichen Verhandlung. (Berlin. Vahlen. 1875.)
Die Parteienvernehmung und der Parteineid. (Wien. Manzschke K. K. Hof-Verlags und Universitäts-Buchhandlung. 1876.) Von Dr. Philipp Harras Ritter von Harrasowsky.
Cours Élémentaire de Droit Criminel, par J. Lefort, Avocat à la Cour d'Appel. Paris. E. Thorin. 1877.

We have also received to date :—

- The American Law Review.* Boston : Little, Brown & Co.
The Southern Law Review. St. Louis : G. J. Jones & Co.
The Albany Law Journal. Albany, N.Y.
The Canada Law Journal. Toronto.
The Scottish Law Magazine. Edinburgh : T. & T. Clark.
The Irish Law Times. Dublin.
The New Zealand Jurist. Dunedin, N.Z.
Journal de Droit International Privé. Paris. Marchal & Billard.
Bulletin de la Société de Législation Comparée. Paris. Cotillon.
Rivista di Discipline Carcerarie. Rome. Tip. Artero.

Legal Obituary of the Quarter.

November.

- 3rd.** PINDER, FRANCIS FORD, Esq., Barrister-at-law, M.A., Trin. Coll. Camb., aged 54. Called I.T., 1857.
- 3rd.** HOLMES, RICHARD, Esq., Solicitor, aged 66. Admitted 1834.
- 4th.** CROCKER, HENRY, Esq., Solicitor, aged 72.
- 6th.** FARRER, OLIVER WILLIAM, Esq., Barrister-at-law, M.A., Oxon., aged 68. Called I.T. 1844.
- 6th.** FEARNLEY, FAIRFAX, Esq., Barrister-at-law, aged 68. Called M.T. 1834. Formerly a Commissioner of Bankruptcy.
- 6th.** SPARLING, WILLIAM, Esq., Solicitor, aged 91. Admitted 1814.
- 7th.** ROGERS, PEARCE WILLIAM, Esq., C.B., late Registrar in the High Court of Chancery, aged 62.
- 15th.** EMERSON-TENNENT, SIR WILLIAM W., Bart., Barrister-at-law, aged 42. Called I.T. 1859.
- 19th.** BROOK, THOMAS, Esq., Solicitor, aged 73. Admitted 1830.
- 22nd.** CHAPMAN, THOMAS SANDS, Esq., Barrister-at-law, aged 76. Called M.T., 1840.
- 25th.** WHITESIDE, RIGHT HON. JAMES, Lord Chief Justice of the Queen's Bench, Ireland, aged 60. Born at Delgany, Co. Wicklow, 1809; son of the late Rev. William Whiteside. Graduated at Dublin, B.A. 1827, M.A. 1832, LL.B. and LL.D. 1839. Called to the Irish Bar 1830; Q.C. 1842; Bencher of King's Inns, Dublin, 1852. M.P. for Enniskillen 1851—1859, in which latter year he was returned for the University of Dublin. Solicitor-General for Ireland 1852, Attorney-General 1858-9. Defended Daniel O'Connell in 1844, and Smith O'Brien in 1848. He was also the advocate of the "Hon. Mrs. Yelverton" in 1862. He was made a Privy Councillor in 1858, and in 1866 succeeded the late Chief Justice Lefroy on the Irish Bench.
- 28th.** WREN-HOSKYNs, CHANDOS, Esq., Barrister-at-law, aged 65. Called I.T., 1838. B.A. Ball. Coll., Oxon., 1834. M.P. for Hereford, 1869-1874.
- 30th.** HORSMAN, RIGHT HON. EDWARD, M.P., Advocate, aged 69. Born 1807. Son of the late William Horsman, Esq., by Jane, daughter of the late Sir John Dalrymple,

Bart., one of the Barons of the Court of Exchequer in Scotland, and sister of the eighth and ninth Earls of Stair. Educated at Rugby. Called to the Scottish Bar 1832, but quitted the forum for politics in 1836, when he entered Parliament as Liberal member for Cocker-mouth. Junior Lord of the Treasury towards the close of Lord Melbourne's Government in 1841. In the same year he married Charlotte Louisa, daughter of the late John Charles Ramsden, Esq., M.P. M.P. for Stroud, 1853-1868. Returned for Liskeard 1869. In 1855 he took office under Lord Palmerston as Chief Secretary for Ireland, but resigned two years later on the ground that he had too little to do.

December.

- 6th. DIXON, BENJAMIN, Esq., Solicitor, aged 80. Admitted 1818.
- 6th. EDWARDS, SIR BRYAN, late Chief Justice of Jamaica, aged 77. Called I.T. 1825.
- 7th. MONTGOMERY, JOHN, Esq., Barrister-at-law, M.A., T.C.D., aged 87. Called to the Irish Bar 1815.
- 8th. COOKE, GEORGE, Esq., Solicitor, aged 81. Admitted 1826.
- 8th. RYE, EDWARD, Esq., Solicitor, aged 74. Admitted 1824.
- 10th. ESMONDE, SIR JOHN Bart., Barrister-at-law, aged 50. Called to the Irish Bar 1850. M.P. for County Waterford from 1852 until his death. A Lord of the Treasury under the Liberal Government in 1866. He married, in 1861, Louisa, daughter of the late Henry Grattan, Esq., and grand-daughter of the late Right Hon. Henry Grattan, by whom he has left issue.
- 10th. WHITE, HENRY HOPLEY, Esq., Q.C., Bencher of the Middle Temple, aged 87. Called M.T. 1818.
- 13th. TURNER, SIR CHARLES ROBERT, Barrister-at-law, aged 87. Called I.T. 1829. From 1839 to 1870, one of the Masters of the Court of Queen's Bench. Knighted 1871.
- 17th. BIRD, CHARLES, Esq., Barrister-at-law, aged 62. Called M.T. 1842.
- 18th. CLARK, THOMAS, Esq., Solicitor, aged 69. Admitted 1858.
- 20th. GREENLAND, THOMAS HUGHES, Esq., Barrister-at-law, aged 76. Called G.I. 1849.
- 23rd. NEAVES, The Hon. LORD, one of the Judges of the Court of Session in Scotland, aged 66. Born in Edinburgh,

1800, at the University of which city he was educated. Called to the Scottish Bar, 1822. Appointed Advocate-Depute, 1841: Sheriff of Orkney and Shetland, 1845; Solicitor-General for Scotland, 1852; a Lord of Session, 1854, and of Justiciary, 1858; in which latter year he unsuccessfully opposed Mr. Gladstone in the contest for the Lord Rectorship of Edinburgh, but subsequently became Lord Rector of St. Andrew's.

23rd. ROLT, JOHN, Esq., Barrister-at-law, M.A. Univ. Coll. Oxon., aged 43. Called I.T. 1859. Eldest son of the late Right Hon. Sir John Rolt.

26th. LEECH, JOSEPH, Esq., aged 74. Admitted 1840.

27th. EDMONDS, JOHN, Esq., Solicitor, aged 81. Admitted 1825.

28th. DALTON, EDMUND, Esq., Barrister-at-law, D.C.L., aged 90. Called G.I., 1832.

28th. McCONNELL, JOHN, Esq., Advocate, aged 87. Called to the Scottish Bar, 1815.

January.

1st. GREY, GEORGE, Esq., Barrister-at-law, aged 41. Called L.I., 1858.

3rd. HOBHOUSE, THOMAS BENJAMIN, Esq., Barrister-at-law, aged 70. Called M.T., 1833. Formerly M.P. for Rochester and for Lincoln.

4th. WRIGHT, PETER, Esq., Solicitor, Clerk of the Peace for Liverpool, aged 79. Admitted 1819.

5th. LEWIN, THOMAS, Esq., Barrister-at-law, M.A., F.S.A., aged 72.

6th. BENNETT, JAMES CHARLES GRAHAM, Esq., Solicitor, aged 72. Admitted 1830.

12th. GAYER, ARTHUR EDWARD, Esq., Q.C., LL.D., aged 76. Called to the Irish Bar, 1827.

13th. SMART, ROBERT, Esq., Solicitor, aged 89.

18th. MATCHAM, GEORGE, Esq., LL.D., aged 88. Admitted an Advocate in Doctors' Commons, 1820. Many years Chairman of Quarter Sessions for Wiltshire.

19th. JERWOOD, JAMES, Esq., Recorder of South Molton. Called M.T., 1836.

27th. PRIDHAM, GEORGE, Esq., Solicitor, aged 71. Admitted 1826.

28th. ERLE, RIGHT HON. PETER, Q.C., aged 83. brother of Sir William Erle, late Chief Justice of the Common Pleas.

Admitted a member of the Middle Temple, 1817; called to the Bar on the 1st of June, 1821; made Queen's Counsel on the 10th of July, 1854; Bencher of the Middle Temple on the 22nd of November, 1854; Treasurer, 1864; Chief Charity Commissioner for England and Wales, and a Privy Councillor, 1872.

28th. ROOKE, THOMAS JAMES, Esq., Solicitor, aged 63. Admitted 1833.

THE LATE MR. THOMAS LEWIN.

Mr. Lewin, an eminent and highly esteemed member of the Equity Bar, who died on the 5th of January, was the fourth son of the Rev. J. S. Lewin, Incumbent of Ifield and Crawley, in Sussex. He was born in 1805, at Ifield, and received his education at Merchant Taylors' School, and afterwards at Trinity College, Oxford, where he was elected to an open scholarship. Among his brother scholars on that foundation, and his attached friends in after-life, were the present Bishop of Rochester, the late Mr. Herman Merivale, Mr. Edward Twistleton, and Mr. H. Davison, afterwards Chief Justice of Bombay. Mr. Lewin closed his academical career in 1828, by taking a first class in classical honours. On leaving Oxford he was admitted at Lincoln's Inn, and was called to the Bar in 1833. Possessing as he did that prime requisite of success, the faculty of taking infinite pains with all that he undertook, it is needless to say that he prospered in his calling. His Court practice, indeed, was not equal to that of some of his competitors, nor was he highly gifted with the qualities of advocacy, but his sound judgment and solid acquirements secured for him the entire confidence of his clients, and by sure degrees he acquired an ample practice. In 1852 he received from Lord St. Leonards, then Lord Chancellor, to whom he had rendered valuable assistance in framing some of his lordship's measures of Law Reform, the appointment of a Conveyancing Counsel to the Court of Chancery, which he retained until his death. Meantime he had brought out the book with which his name will be permanently identified, first published in 1837, and now in its sixth edition, his "Treatise on Trusts," which has long taken rank as one of the authoritative text-books of the profession.

But while assiduously engaged in the active practice of the Bar, Mr. Lewin found leisure, like many other energetic lawyers, for the prosecution of more varied studies. The cultivation of the historical and antiquarian tastes which he had early imbibed afforded refreshment to his mind in alternation with those legal

labours on which they were never suffered to encroach. Regular habits and a careful economy of time enabled him to give to the world the fruits of his industry, which was constantly engaged in elucidating questions of history or chronology, all of which demanded careful investigation and scrupulous accuracy. His treatise on the controverted locality of Julius Cæsar's first landing in Britain, his work on the much-disputed topography of Jerusalem, his "Fasti Sacri"—an elaborate disquisition on the chronology of the New Testament,—and his most important work, "The Life and Travels of St. Paul,"—all evince that exhaustive research and thoroughness of execution, shrinking from no toil and evading no difficulty, which were the reflection not only of the penetration of his mind but of the honesty of his nature. The last mentioned work, begun early in life, grew up under his hands, employing the intervals of his leisure for full forty years, during which he more than once personally inspected all the principal scenes to which it relates. As it now appears in its third edition, in two quarto volumes, with all the attractions of exquisite typography and abundant historical illustrations, many of them from sketches of his own, it forms at once a beautiful and most instructive contribution to sacred literature.

Mr. Lewin did not marry till somewhat late in life, but no man was happier in his domestic relations, or possessed in a greater degree the cordial attachment of friends.

G. K. R.

CALLS TO THE BAR.

Michaelmas Inns of Court Term, 1876.

Lincoln's Inn.—Arthur Matheson Fraser, Esq., B.A. and LL.B., Cambridge, and of the University of London; Henry Philip Roche, Esq.; Frederick William Maitland, Esq., B.A., Cambridge; Isaac Saunders Leadam, Esq., M.A., Oxford, Fellow of Brasenose College; Alexander Gordon, Esq., B.A., Cambridge; Andrew John Leach, Esq., B.A., Oxford; Henry Alleyne Bovell, Esq., University of London; Frederick Charles Aplin, Esq., B.A., Oxford.

Inner Temple.—John Harvey Templer, Esq., B.A., Cambridge; John Bagnall Evans, Esq., M.A., Oxford; Walter W. Rouse Ball, Esq., B.A., Cambridge; Samuel Evan Butler, Esq., M.A., Oxford; John Skirrow Follett, Esq., B.A., Cambridge; Arthur Hammond Robin, Esq., B.A., Cambridge; Henry W. Eaden, Esq., B.A., Cambridge; Hon. Mark Francis Napier, B.A., Cambridge; Ernest Mackean, Esq., B.A., Cambridge; Philip Francis Walker, Esq.; Granville George Miller, Esq., B.A., Cambridge; Cuthbert John Ottaway, Esq., B.A., Oxford; Walter Shirley Shirley, Esq., B.A., Oxford; Charles Henry Lomax, Esq., B.A., Oxford; Thomas Marshall Todd, Esq., M.A., Oxford; James Parsons, Esq., B.A., Oxford; Henry Thomas Hyde, Esq., LL.B., Cambridge; Edward Bennett Calvert, Esq., B.A., Cambridge; Johannes Henricus Lange, Esq., LL.B., Cambridge; William Wills, Esq., B.A., Cambridge.

Middle Temple.—Louis Kossuth Laurie, Esq.; Nanda Lal Dey, Esq.; Francis William Bradney Dunne, Esq., of King's Inns, Barrister-at-Law, and of Trinity College, Dublin, B.A., LL.B.; Arthur Francis Leach, Esq., B.A., Fellow of All Souls', Oxford; Granville George Greenwood, Esq., B.A., Cambridge; Radhikapraad Ghosh, Esq.; Francis Taylor Piggott, Esq., B.A., Cambridge; Edwin Flynn, Esq.; William Tucker, Esq., B.A., Oxford; Arthur Child, Esq.; Samuel Henry Day, Esq.; Walter Talbot Cairns, Esq.; Thomas Charles Hedderwick, Esq., M.A., Glasgow University; Joseph Edwin Crawford Munro, Esq., LL.B., Cambridge, and of the Queen's University, Ireland, holder of a Studentship in Roman Law and Jurisprudence from the Council of Legal Education; Samuel Smith-Dorsett, Esq.

Gray's Inn.—John Joseph Francis, Esq., of the London University; Edward Cant-Wall, Esq.

Hilary Inns of Court Term, 1877.

Lincoln's Inn.—Henry Brettingham Adams, Esq., B.A., Cambridge; Benjamin Edward Somers, Esq., of Merton College, Oxford; George John Chapman, Esq., B.A., Oxford; Thomas Cyprian Williams, Esq., LL.B., Cambridge; Charles Swann Shield, Esq., B.A., Cambridge; Urquhart Atwell Forbes, Esq., University of London; Henry George Willink, Esq., B.A., Oxford; George Stuckey Lean, jun., Esq., B.A., Oxford; John Mitchel Chapman, Esq., LL.B., Cambridge; Arthur Ryle Harding, Esq., B.A., Oxford; Henry Stanton, jun., Esq., B.A., Oxford; John Satterfield Sanders, Esq., B.A., Oxford; Hubert Winstanley, Esq.; George Lewis Denman, Esq., LL.B., Cambridge; Henry

Storer Bowen, Esq., B.A., London; Frederick Lechmere Paton, Esq., B.A., Oxford; Richard Booth, Esq., B.A., Cambridge; Frederick James Norman Pearson, Esq., B.A., Oxford; William James Wright Ingham, Esq., B.A., Cambridge; Ng Choy, Esq., of Hongkong, China.

Inner Temple.—John Pickersgill Rodger, Esq. (holder of a Certificate of Honour, 2nd class, Hilary Term, 1877); William Wallace Cragg, Esq., M.A., Oxford; William Hamilton Phillips, Esq., B.A., Oxford; Berthold Robert Stansfeld, Esq., M.A., Cambridge; Arthur Andrew Cecil Dunn-Gardner, Esq., M.A., Oxford; James Dominick Daly, Esq.; George Hone Hone-Goldney, Esq., B.A., Cambridge; Henry Hatchell Warren, Esq., B.A., Oxford; Ernest Beauchamp Nelson, Esq., B.A., Oxford; Francis Lea Stourbridge Smyth, Esq., Oxford; John Heywood, Esq., B.A., Cambridge; Abraham Lionel Hart, Esq., LL.B., London; Robert Alexander Milligan Hogg, Esq., B.A., Cambridge; George Macan, Esq., B.A., Cambridge; Arthur Baptist Noel, Esq.; Augustine Robert Whiteway, Esq., M.A., Cambridge; George Meryon White, Esq., B.A., Oxford; Arthur Bruce Smith, Esq.; Lancelot Edward Lawford, Esq., B.A., Oxford; Francis Ernest Colenso, Esq., B.A., Cambridge; John William Proudfoot, Esq.; Percival Broadbent, Esq.; Marie Louis Alexandre Hugues, Esq.; William John Richardson, Esq., B.A., Cambridge; Thomas Sutherst, Esq., Cambridge; Herbert Parker Reed, Esq.; William Frederick Barry, Esq., B.A., Dublin.

Middle Temple.—Thomas Austin Guerin, Esq.; Charles Edmund Fox, Esq.; Patrick Alexander Donald Carnegie, Esq.; Alfred de Bathe Brandon, Esq., of Trinity Hall, Cambridge; Eugenius Charles Jackson, Esq.; Charles Richard Amesbury Birch, Esq.; James Blenkinsopp, Esq.; Alexander Coghill Wylie, Esq.; Gaupat Sarvottam Mankar, Esq.; Albert Edward Nelson, Esq.; Walter Coates, Esq.; Slade Butler, Esq., B.A., Oxford.

Gray's Inn.—Miles Walker Mattinson, Esq., "Bacon Scholar," Gray's Inn, T.T. 1874, First-class Studentship, T.T. 1875, Certificate of Honour, T.T. 1876.

COUNCIL OF LEGAL EDUCATION.

Hilary Examination, 1877.

At the General Examination of Students of the Inns of Court, held on December 29 and 30, 1876, and January 1, 2, 3, and 4, 1877, the Council of Legal Education awarded to—

Edward Harper Parker, Esq., of the Middle Temple, and Charles Alfred Russell, Esq., of Gray's Inn, Studentships in Jurisprudence and Roman Civil Law, of 100 guineas, to continue for a period of two years; Thomas Turquand Fillan, Esq., of the Middle Temple, and John Greenwood Shipman, Esq., of the Inner Temple, Studentships in Jurisprudence and Roman Civil Law, of 100 guineas, for one year; John Pickersgill Rodger, Esq., of the Inner Temple, a Certificate of Honour of the second class.

At the December Examination, 1876, on the subjects of the Lectures of the Professors of the Inns of Court, held at Lincoln's Inn Hall, on December 18 and 19, 1876, the Council of Legal Education awarded the following prizes to the undermentioned students:—

Jurisprudence, Roman Law, International Law, and Constitutional Law and Legal History—Charles Alfred Russell, Esq., of Gray's Inn, £50; Thomas Turquand Fillan, Esq., of the Middle Temple, £15; Reinhold Gregorowski, Esq., of Gray's Inn, £10.

Equity—Nathaniel Spencer, Esq., of the Middle Temple, £50; William George Thorpe, Esq., of the Middle Temple, £15.

Common Law—Thomas Francis Byrne, Esq., of the Middle Temple, £37 10s.; John Lawson Walton, Esq., of the Inner Temple, £37 10s.; Seymour Bushe, Esq., of the Inner Temple, and Vincent Brown, Esq., of Gray's Inn, £12 10s. each.

Real and Personal Property Law—Thomas Clarkson, Esq., of Lincoln's Inn, £50; James Lawrence Carew, Esq., of the Middle Temple, £25; James Power Everard, Esq., of the Middle Temple, £15.

The Council have also awarded to the student who obtained the greatest aggregate number of marks in the subjects of the Lectures given by two of the Professors, namely, in *Jurisprudence, Roman Law, International Law, and Constitutional Law and Legal History, and Common Law*—Edward Harper Parker, Esq., of the Middle Temple, £30.

Hilary Educational Term, 1877.

SCHEME OF LECTURES.—SUBJECTS AND PROFESSORS.—*Jurisprudence, including International Law, Public and Private—Roman Civil Law—and Constitutional Law and Legal History.*—Professor: Sir Edward Shepherd Creasy, M.A. Lectures delivered in the Middle Temple Hall, on Tuesday, at 11 a.m., and on Wednesday at 11 a.m. First lecture on January 23.

Equity.—Professor: Arthur Shelly Eddis, Esq., Q.C. Lectures delivered in the room under the Library at Lincoln's Inn Hall, on Wednesday, at 4.15 p.m., and on Friday, at 4.15 p.m. First public lecture on January 12.

The Law of Real and Personal Property.—Professor: Joshua Williams, Esq., Q.C. Lectures delivered in Gray's Inn Hall, on Tuesday, at 4.15 p.m., and on Saturday, at 3.15 p.m. First lecture on January 13.

The Common Law.—Professor: Sir James Fitzjames Stephen, Q.C. Lectures delivered in the Inner Temple Hall, on Monday, at 4.15 p.m., and on Thursday, at 4.15 p.m. First lecture on January 15.

PROSPECTUS OF THE LECTURES OF THE PROFESSORS.

The Professor of Jurisprudence and Roman Civil Law will, during the ensuing educational term, deliver a course of about twelve public lectures on Constitutional Law and Legal History. First lecture on this subject will be delivered on Tuesday, January 23, at 11 a.m. The subsequent lectures on this subject will be delivered on Tuesdays and Wednesdays at the same hour.

Equity.—The Professor of Equity will deliver, during the ensuing educational term, fourteen lectures on Equity, as applied: 1. To Partnerships and Partnership Accounts. 2. To the Raising of Portions or other Charges on Land. The first lecture on this subject will be delivered on Friday, January 12, at 4.15 p.m., and the subsequent lectures at the same hour on Wednesdays and Fridays during the term.

Law of Real and Personal Property.—The Professor of the Law of Real and Personal Property will deliver, during the ensuing educational term, twelve public lectures on the following subject:—On Prescriptive Rights, including Rights of Common. First lecture on this subject will be delivered on Saturday, January 13, at 3.15 p.m. The subsequent lectures on this

subject will be delivered on Tuesdays at 4:15 p.m., and on Saturdays at 3:15 p.m.

Common Law.—The Professor of the Common Law will deliver, during the ensuing educational term, twelve public lectures on Criminal Law. First lecture on this subject will be delivered on Monday, January 15, at 4:15 p.m. The subsequent lectures will be delivered on Mondays and Thursdays at the same hour.

Note.—In December, 1877, there will be four examinations, one in the subject of the lectures given by each professor, open (subject as hereinafter-mentioned) to all students who have during the year attended the lectures of any of the professors, but no student will be admitted to the examination in the subjects of the lectures of any professor unless he shall have attended at least two-thirds of the lectures given during the year by such professor. No student will be admitted to more than two examinations; and no student who shall have obtained a studentship will be admitted to any such examination. After the examination the following prizes will, on the recommendation of the committee, be given (that is to say): To the students who shall have passed the best examination in the subjects of the lectures of each professor, first prize, £50; second prize, £25; third prize, £15; fourth prize, £10. And a first and second prize of £70 and £30 respectively, to the students who obtain the greatest aggregate number of marks in the examination in the subjects of the lectures given by any two of the professors. No student will be entitled to more than one prize, but a student will receive the prize of the highest value to which he shall appear to be entitled. The committee will not be obliged to recommend any of the above prizes to be awarded, if the result of the examination be such as, in their opinion, will not justify such recommendation.

MIDDLE TEMPLE.—As an encouragement to the students of this Inn, the Benchers have, in addition to the studentships and prizes awarded by the Council of Legal Education, recently established eight scholarships—four of fifty guineas each, and four of 100 guineas each—the competitors being the students of the Middle Temple.

THE LAW MAGAZINE AND REVIEW.

No. CCXXIV.—MAY, 1877.

I.—ON THE INTERNATIONAL JURISDICTION OF THE ADMIRALTY COURT IN CIVIL MATTERS.

IT is an interesting problem, not the less interesting because its solution does not admit of historical certainty, what was the true character of the famous Rhodian Sea Laws, whether they were the judgments of a Maritime Tribunal, like those of Oleron, or ordinances drawn up by a Guild of Navigators, like those of Trani, or customs of navigation compiled by maritime experts, like those which have been collected in the Book of the Consulate of the Sea of Barcelona. Whatever may have been their origin, this much is certain, that they were received at Rome before the fall of the Republic, and that they were allowed to form part of the general system of law, by which the maritime world was governed during the best period of the Roman Empire. It is hardly a less difficult question to solve satisfactorily, whether the Rhodian Sea Laws had been reduced into writing at the time, when they were first received at Rome. The circumstance that no fragments have come down to us of any collection of those laws, which was in use at Rome in the early days of the Empire, is by no means conclusive, for the text of the greater part of the Athenian Laws* would have been

* The Athenian Laws, as an example of written Laws, are thus contrasted with the Laws of the Lacedæmonians, "*Et non ineleganter in duas species jus*

unknown to us, if they had not been preserved incidentally in the eloquent pleadings of Demosthenes. In like manner we are indebted to Julius Paulus, Papinian's scholar, who lived in the reign of Alexander Severus, for the preservation of a fragment of the Rhodian Law on the subject of Maritime Jetison in terms, which are almost conclusive that he had before him the text of a written law on that subject. Further, there is evidence of a still earlier period, preserved in a fragment of a Law Manual, which was compiled by Volusius Mæcianus* for his Imperial pupil Marcus Aurelius, that the Rhodian Sea Laws were received in writing at Rome in the reign of the first Augustus, and that they were declared by that Emperor to be of paramount authority in matters of the Sea, where they were not in conflict with any Imperial Ordinance.

The city of Rhodes, the walls of which, according to Strabo the Geographer, were built by the same architect who constructed the Long Walls, which connected Athens with the Piræus, was the capital of an Island, which Nature had admirably fitted to become a great centre of commerce between the western and the eastern ports of the Mediterranean, at a time when the ravages of the Cilician pirates rendered access to the Syrian harbours a work of great danger. The Island of Rhodes may be regarded as occupying in the fourth century before Christ a position

civile distributum esse videtur: nam origo ejus ab institutis duarum civitatum, Athenarum scilicet et Lacedæmoniorum, fluxisse videtur. In his enim civitatibus ita agi solitum erat, ut Lacedæmonii quidem magis ea, quæ pro legibus observabant, memoriæ mandarent; Athenienses vero ea, quæ in legibus scripta comprehendissent, custodirent." Justiniani Institut., Lib. i, Tit. ii, Sec. 10.

* The well-known passage is in the Greek tongue of the Augustan period. The Emperor Antonine is reported to have made answer to the petition of a certain Eudæmon of Nicomædia, who complained of having had to pay custom duties on certain goods, which had been salvaged from a vessel wrecked on one of the Cyclades Islands, Εγὼ μὲν τοῦ κόσμου κυριός, ὁ δὲ νόμος τῆς θαλάσσης. Τῷ νόμῳ τῶν Ῥοδίων κρινέσθω τῷ ναυτικῷ, ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναντιοῦται. Τοῦτο δὲ αὐτὸ καὶ ὁ θεότατος Αὐγούστος ἔκρινεν.

in the commerce of the Mediterranean very similar to that, which the Island of Gotland occupied in the twelfth century after Christ in the commerce of the Baltic, when Wisby, the capital of the latter Island, became the emporium of the trade between the ports of the North Sea and the ports of the Gulf of Finland, through which the trade of Western Europe with Northern Asia was carried on. It is perhaps not too bold a conjecture to suppose, that the affluence to Rhodes of mariners of all nations, as it created a necessity for tribunals to settle their disputes, so it afforded a facility for reducing into writing their maritime customs, and hence a body of Customs of the Sea was compiled, which formed the substance of the celebrated Rhodian Sea Laws. But Rhodes had also a well-merited fame for having checked the practice of piracy in the Seas of the Levant, before the Island became the ally of the Roman Republic, and the circumstance that Pompey the Great, after that alliance had been concluded, undertook and accomplished the task of exterminating the Cilician pirates may be attributable, in some respects, to the early lessons, which he had received from Aristodemus, a grammarian of Rhodes, who was the præceptor of his youth.

There has been handed down to our times a collection of Sea Laws, under the title of Νόμος Ῥοδίων Ναυτικὸς, which some writers have accepted, but which have no just claim to be received, as the original Rhodian Sea Laws. The earliest extant MS. of these Sea Laws is preserved in the library of the Vatican at Rome, and is in a hand of the twelfth century, and the same volume contains a code of Laws drawn up in the same century for the Greek inhabitants of the Island of Cyprus, to which the Sea Laws are appended. M. Pardessus* inclines to the opinion

* Collection de Lois Maritimes antérieures au XVIII^eme Siècle, Tom. i., p. 220. M. Pardessus grounds his opinion chiefly on the fact, that there is no reference in these Sea Laws to any provisions of the Basilica, whilst there are frequent references to the Digest and the Code of Justinian.

that these so-called Rhodian Sea Laws belong to a period antecedent to the Basilica, and M. Heimbach in his recent and most valuable edition of the Basilica, in other words, of the Laws of the Eastern Empire as compiled in the reigns of the Emperor Basilius the Macedonian, and his son Leo the Wise (A.D. 880—886), has inserted these Sea Laws, as forming part of the fifty-third book of that compilation. There are some grounds for the opinion, that these Sea Laws were drawn up in their present form in the sixth century after Christ, but to whatever period they may be properly assigned, there are such remarkable differences on the subject of maritime jetison between these Sea Laws and the provisions of the *Lex Rhodia de Jactu*, as cited in the Digest of Justinian,* that we are justified in pronouncing them not to be identical with the Sea Laws, which were received at Rome under the name of the Rhodian Sea Laws in the early days of the Empire. For instance, the 30th Article of these Sea Laws provides, that in cases of shipwreck, where the vessel is lost, such portions of cargo as may be saved shall contribute to make good the loss of the ship, which is contrary to the provision of the *Lex Rhodia de Jactu* set out in the Digest, and according to which no contribution whatever in such a case is required from the cargo. This and other discrepancies on the subject of general average, which are found to exist between the earlier and later texts of the Rhodian Sea Laws, are deserving of attention, as they enable us to identify, in the earlier body of these Sea Laws the groundwork, upon which an uniform system of Maritime Law was maintained in Western Europe after the Fall of the Western Empire. The maintenance of such an uniform law was favoured by the principle sanctioned by the Ostrogothic Code of Theodoric (A.D. 500),† namely, that in the

* The second title of the Fourteenth Book of the Digest is headed, "*De Lege Rhodia de Jactu*." All that is trustworthy in the way of tradition as to the famous Rhodian Sea Laws is to be found under this title of the Digest.

† These laws are generally entitled, "*The Edict of Theodoric*."

absence of other rules to be found in that code the customary rule of law (*legum usualis regula*) should be observed by every person, whether of Gothic or of Roman origin. There can be little doubt that the traditions of Imperial Rome are also discernible in the Maritime Laws of the Visigothic monarchs of Spain. There is, however, a notable difference to be observed between the practice of the Ostrogoths in Italy, who maintained the Roman principle, according to which foreign merchants and mariners were allowed to have their disputes settled at Rome, according to their own laws, by *Roman Magistrates*; and the practice of the Visigoths in Spain, who adopted the Greek* principle, according to which merchants and mariners were allowed to have their disputes settled in foreign countries, according to their own laws, by *their own judges*. The former of these systems may be styled, for convenience, the *prætorian*;† the latter, the *consular*‡ system. The former was adopted in the Atlantic seaports north of the Pyrenees, where the Ostrogothic element prevailed, and it was accepted in England and in the ports of Flanders at the earliest period, of which we have any certain knowledge, whilst the latter prevailed in the Mediterranean seaports, and in the ports of the Levant, where it perhaps had its original home. The former system was adopted by States in the exercise of their own free will; the latter was, for the most part, the result of international agreement; and it is a curious circumstance, that,

* The earliest historical record of the legal autonomy of a trading factory established in a foreign land, is to be found in the special privileges granted to the Greek merchants who frequented the port of Naucratis, in Egypt, in the reign of King Amasis, B.C. 526. Herodotus, Lib. ii., ch. 178.

† From the *prætor peregrinus* of Rome, whose office was established B.C. 246, and who administered justice amongst foreign merchants, and between foreign merchants and Roman citizens.

‡ From the mediæval consul, who is of Spanish or Italian origin, and who accompanied every merchant ship engaged in foreign trade in the Levant, and who administered the Law of the flag amongst the merchants and mariners on board, and whilst they were commorant in foreign ports.

when the merchants of Northern Europe, through the active enterprise of the mariners of Wisby, opened a trade with the distant East through the Gulf of Finland, they stipulated for privileges at Novgorod, then the centre of Russian commerce, similar to those which the merchants of the South of Europe enjoyed in the cities of Syria and of Egypt. In evidence of this early practice a Latin treaty of the thirteenth century may be cited, which has been preserved in the archives of Lubeck, which records the grant of special privileges to the Teutonic and Gothic merchants and mariners frequenting Novgorod, with reciprocal liberties to the merchants and mariners of Novgorod, who should frequent the island of Gotland; amongst which privileges it was provided that they might have their disputes settled according to their own laws by their own judges.* It is to a like condition of commercial intercourse, that we are indebted for the preservation of many Northern Sea Laws in MSS. of the fourteenth century, inasmuch as written versions of those laws were needed for the guidance of the Maritime Judges in foreign ports. It is likewise a remarkable fact, illustrative of the extent to which a common Maritime Law was received throughout Europe, after Rome had ceased to be its Imperial mistress, that in a body of Russian Law, termed *Pravda Rousskaia*, or *Pravda Slavian*,* which was promulgated at Novgorod in the eleventh century, there is found a Law on the subject of stealing ships or boats, which is identical in its provisions with a Law of the Burgundian Code of the sixth century, and with a Law which is found in the earliest Code of Laws reduced into writing at Lubeck in the twelfth century, and also with a Law, which has found a place amongst the Sea Laws of Wisby.

* The text of this treaty is published in *Dreyer de Inhumano Jure Naufragii*, p. clxxvii.

* *M. Pardessus*, Tom. iii., p. 490, is an authority for the existence of this Law.

There is a tradition that Eleanor, Duchess of Aquitaine, one of the most remarkable personages of her sex, as far as energy of character is concerned, on the occasion of her visit to the Holy Land with her first husband, King Louis VII of France, who was one of the leaders of that disastrous expedition, known as the Second Crusade (A.D. 1147), was much struck by the circumstance, that she met with Customs of the Sea embodied in writing and accepted in the East as Maritime Laws. It is not improbable that certain Maritime Customs had at that time been reduced into writing for the use of the merchants and mariners of Western Europe, who had obtained the privileges of what has been termed Consular Government in the Syrian ports, subsequent to the first Crusade (A.D. 1099). This circumstance is stated by Cleirac in the introduction of his work on the "Usages and Customs of the Sea,"* to have suggested to Queen Eleanor on her return to Aquitaine, the project of reducing into writing the Customs of the merchants and mariners of the Atlantic seaports, and these Customs were subsequently embodied under her direction in a Collection of Sea Laws, to which the title of "Judgments of the Sea" has been attached, although in some cases they are styled by the earlier title of "Customs of the Sea." A Custom, in the legal sense of the Gallican term "Coutume," ought not to be confounded with a mere usage. An usage as such was not necessarily binding in Law, but it became binding after it had been recognised by a Judgment, and it thereby acquired the distinctive title of a Custom. Hence the saying of the mediæval jurists, "Lex," by which was meant the traditional text of the Roman Law, "est sanctio sancta, bona autem consuetudo est sanctio sanctor, et ubi consuetudo loquitur, lex omnis tacet." Hence our own Bracton says, "Cum autem fere in omnibus regionibus utantur legibus et jure scripto, sola Anglia usa est in suis finibus jure non scripto et consuetudine."† A Custom however

* *Us et Coustumes de la Mer.* Bourdeaux. 1647. 4to. † *Lib. i., ch. 1., sec. 2.*

was for the most part allowed to remain unwritten, and when it had to be enforced as Law, proof of it had to be given by the testimony of skilled experts, and this unwritten condition of Law was, for a long time, preferred by an unlearned laity, jealous of their liberties, who feared to subject themselves to written laws, the record of which might be at any time falsified by a skilful clerk. Hence the reluctance of the great Barons under the Feudal system to acknowledge any written record of the Law, which they had to obey, and thus we find that the testimony of skilled experts was called in to vouch the Law in the early part of the reign of William the Conqueror in the two great causes, of which a record has been preserved to us by the Annalists of his reign. In the earlier of these two causes, which is known by the name of the Plea of Pinenden in Kent, it is recorded that Aegelric, the aged Bishop of Chichester, was brought into Court by command of the King to inform them as to the Law. He is described by the annalist as "*Vir antiquissimus et legum terræ sapientissimus, qui, ex præcepto Regis, advectus fuit ad ipsas antiquas legum consuetudines discutiendas et edocendas.*"*

It is not easy to determine how or when the practice, which had been instituted in the reign of Theodoric the younger, of enrolling judicial acts fell into disuse, or how and when it was revived in Western Europe. But it would seem to have been resumed at Oleron before the time when the Judgments of the Sea were there compiled, as the full title, under which those judgments have been handed down to us in the earliest MSS., is "The Rolls of Oleron of the Judgments of the Sea." Such is the title prefixed to those Sea Laws in the oldest extant MS. of them, which exists at the present time in the Archives of the Guildhall of the City of London, as well as in the oldest translation of them into the Flemish tongue, which is preserved in a MS. volume in the Archives of the Town Hall of the City of Bruges. Both

* Selden in his notes on Eadmer cites this passage from the Rochester MS.

these MSS. are in a handwriting of the fourteenth century, the Guildhall MS. being rather the earlier of the two MSS. There is no extant record of the text of these Sea Laws, which is of an earlier date, for the Black Book of the Admiralty, in which they are inserted, is of a later handwriting.

There is little doubt that the Judgments of Oleron are the judgments of a tribunal exercising maritime jurisdiction according to the Custom of the Sea. It is a disputed point whether their name entitles us to regard them as the judgments of a Court established at Oleron, or as the judgments of various Maritime tribunals in the Duchy of Aquitaine, which were compiled at Oleron, where Queen Eleanor loved to reside, and which, from that circumstance, had the name of the island connected with them.

The main argument advanced against their being judgments of a Maritime Court at Oleron is that there is no historical record of the existence of any such Court of an importance adequate to commend its judgments to general acceptance; but the recent discovery of a MS. in the Bodleian Library at Oxford, written in a hand of the fourteenth century, and published for the first time in the second volume of the Appendix to the Black Book of the Admiralty,* has thrown new light on this subject. This MS. purports to contain "the good usages and the good Customs, and the good judgments of the Commune of Oleron," and it discloses to us a tribunal administering the Laws of the Sea to passing mariners of every nationality, the Court in question being the Court of the Mayor of the Commune of Oleron, in which the Prudhommes Burghers were assessors. There has been published in the same

* The MS. is No. 227 in the Douce Collection at Oxford. It is a small quarto on vellum, written in a hand of the fourteenth century, and purports to have been compiled by Guillaume Guischos, clerk of the Commune of Oleron. A judgment given in chapter lxxxvii. on the subject of part owners of ships, discloses to us the fact, that Breton mariners had frequent recourse to the Court, which may account for the early reception of the Laws of Oleron in Brittany.

volume of the Appendix to the Black Book, also for the first time, a collection of the good customs of an English maritime borough in the reign of King John, entitled the Domesday of Ipswich, which is of a period nearly contemporaneous with the Coutumier of Oleron, and in this volume we find mention of a Court, which was held by the Bailiffs of the Borough of Ipswich from tide to tide, to determine pleas according to the Law Marine "between strange mariners passing, and them that abide not but their tide." On the other hand, the existence of Courts of the Sea in the Mediterranean at a still earlier period is proved by the Maritime Laws of King Amauri I. of Jerusalem, which have been preserved to us in the Assises of the Burghers' Court of the Latin Kingdom of Jerusalem; whilst on the shores of the Baltic, a Maritime Court, established at Dantzic under the auspices of the Knights of the Teutonic Order, was so famous in the latter part of the fourteenth century, under the Mastership of Conrad von Jungingen, for the wisdom and equity of its judgments, that masters and mariners of all nations had recourse to it. It is probable that we are indebted for the preservation of the *best text* of the greater portion of those Northern Sea Laws, which are known by the title of the Maritime Law of Wisby, to the circumstance that the Town Council of Dantzic procured from Wisby, in the middle of the fifteenth century, a copy of the Wisby text of "the Sea Laws," as being much clearer than the text in their own possession. A copy of the letter containing this request is preserved in the Archives of the Town Council of Dantzic, as well as a MS. of Sea Laws, which are identical with the two most important divisions of the Sea Laws printed for the first time at Copenhagen in 1505 by Godfrey of Gemen as the Gotland Sea Laws, and which collection of Sea Laws, in the course of the sixteenth century, became known in the ports of the North Sea as the Wisby Sea Laws. In fact, there can be no doubt that the Roman Empire at its

downfall bequeathed to Europe a common Maritime Law grounded on the Customs of the Sea, and that although that law was accommodated during the Middle Ages to the altered conditions of commercial life in different parts of Europe, and slight discrepancies are discoverable in the Customs of the Sea, which prevailed in the Mediterranean as distinguished from the Northern Seas of Europe, yet there was an universal practice to administer in every country a common Law Marine to passing mariners, and the jurisdiction of the Maritime Courts in civil matters was by custom *international*. Such we apprehend to have been the state of the Maritime Courts throughout mediæval Europe before the name and office of Admiral came into use, an office which had originally a judicial character only for purposes of war, but which gradually usurped to itself judicial functions in time of peace, and through which the Crown of England during the Edwardian period succeeded in reducing into a more systematic form the administration of the Common Law of the Sea to the merchants and mariners of various nationalities, who frequented the ports of the Realm.

The term Admiral, or Ammiral, as Milton spells the word in his "Paradise Lost," is no doubt derived from an Arabic source. There is no reason to believe that the term Admiral had become familiar to the nations of Europe before the Fourth Crusade (A.D. 1189), when the monkish chroniclers Latinised the Arabic title of Amir or Emir (Admiratus), which was equivalent to that of Commander, and applied it familiarly to the commanders of Arabic or Saracenic squadrons, with which the English fleets came into conflict. The termination "al" is simply a suffix. Thus Amir-al-Moumenin, which signifies "Commander of the Faithful," was the title assumed by the Arabian Sovereigns of Africa, and it is easy to understand how readily such a title became corrupted by European sailors into "Amiral Moumenin." The title, however, of Admiral does not appear to have

come into use in England before the reign of Edward I., the first mention of the appointment of an Admiral of England occurring in the Patent Rolls of 23 Edw. I., in which there is the entry, "*Willielmus Leybourne constitutus Capitaneus Marinariorum, etc. Idem constitutus Admirallus Angliæ.*" It is true that in the third part of the Black Book of the Admiralty, which contains "ancient rules and orders about matters which belong to the Admiralty," there is reference to an ordinance made by the Admirals of the North and of the West at Ipswich in the time of Henry I., but the better opinion would seem to be that the Commanders of the Fleets of the North and of the West were properly designated Captains and Rulers of the Fleet (*Capitanei et Gubernatores Navigii*) in the reign of Henry I., precisely as we find the Commanders of the great fleet assembled by Richard I. at Oleron for the Fourth Crusade against the Saracens were entitled "*Ductores et Gubernatores totius Navigii.*" The title of Admiral would thus appear to have been of novel adoption in the reign of Edward I., although the office was in a certain sense ancient; and we are disposed to think that the introduction of the new title had a special significance, and implied an enlargement of the judicial authority hitherto exercised by the "*Capitaneus Navigii*," and by his Lieutenants throughout the coasts and ports of the Realm, and that the King's Admiral henceforth took a more active share in the exercise of that general jurisdiction in maritime matters, which had been hitherto exercised somewhat imperfectly by the Wardens and Bailiffs of the maritime towns and of the great Lords, who had maritime franchises. Besides, the Fourth Crusade had contributed to make more widely known Queen Eleanor's collection of Sea Laws, and a well-founded tradition has assigned to her son, King Richard I., the credit of having published those Sea Laws in England on his return from the Holy Land. Whatever may be the value of this tradition, there is no doubt that the Laws of

Oleron were received in England in the reign of Edward I., and were administered in the English Maritime Courts as customary Laws of the Sea. The famous Roll of 12 Edward III., endorsed "De Superioritate Maris," still exists in the Record Office, under which the King's Justiciaries were consulted "how best to resume and continue the mode of proceeding instituted by the King's grandfather and his Council (2 Edward I.) for the purpose of maintaining the ancient supremacy of the Crown over the Sea of England and the right of the Admiral's office over it, with a view to uphold the Laws and Statutes made by the Kings of England in order to maintain peace and justice amongst the people of every nation passing through the Sea of England, and to punish delinquents and afford redress to the injured, which Laws and Statutes," the Roll goes on to say, "were by the Lord Richard, formerly King of England, on his return from the Holy Land, corrected, interpreted, and declared, and were published in the Island of Oleron, and were named in the Gallican tongue, 'La ley Olyroun.'"

The Statute Book of the reign of Richard II. supplies evidence of a struggle on the part of the Admiral's Court to exercise concurrent jurisdiction with the Court of King's Bench in respect of certain matters arising within the realm, which the Court of King's Bench strenuously resisted; and as it had been found expedient to restrain the Common Law Courts, by a special Order of the King and Council in 35 Edward III.,* from exercising jurisdiction over and

* This Order in Council has been referred to by Lord Hale as fixing the period "since which," he says, "I have not observed that the King's Bench or Courts of Common Law have proceeded criminally in cases of crimes of this nature committed on the High Seas." The Order itself is recorded in the Close Roll 35 Edward III., membr. 28; and it is of so much importance in its bearings on the recent case of the *Franconia* that we subjoin it in full:—
 "Rex dilectis et fidelibus suis Roberto de Herle et Roberto Belknap, salutem. Licet nuper assignaverimus vos et quosdam alios fideles nostros ad diversas transgressionem et felonias per quosdam subditos nostros et alios supra mare

applying the Common Law of the Realm to offences committed upon the Seas, so it was now found necessary to restrain the Admiral and his deputies, by 13 Richard II., ch. 5, from meddling with anything done within the Realm of England, with the exception, as provided by the subsequent enactment of 15 Richard II., ch. 3, that the Admiral should have cognisance of certain offences committed on board of great ships hovering in the main stream beneath *the first bridges* of the said rivers. It is a curious fact, illustrative of the well-founded fear entertained by the Barons in olden time, lest the Laws might be falsified by a skilful clerk, if the text of a written law were permitted to be cited as proof of the law without calling experts to testify to the law, that there are two readings of the well-known Statute of 15 Richard II., ch. 3, which assign to the Admiral's jurisdiction very different limits, according as the word "pountes" (bridges), or the word "pointes" (headlands), is adopted. There can be little doubt that the former is the correct reading. It is the reading of the Par-

quibusdam mercatoribus, tam alienigenis quam indigenis existentibus in quadam navi Johannis Goldbetere, Johannis Salaman de Anglia et Jakemart Fleming mercatoribus, unde Christianus de Lescluse magister extitit, et quæ navis diversis bonis et mercimoniis ad valenciæ viginti millium librarum apud Nautes in Britann, carcata fuit, exinde usque Flandriam ducendis illatas et perpetratas ut dicebatur, audiendas et terminandas *secundum legem et consuetudinem Regni nostri*. Quia tamen, negotio hujusmodi coram nobis et consilio nostro jam noviter deducto, videtur esse consonum dictis legi et consuetudini, quod felonie, transgressiones, seu injuriæ *super mare* factæ, non coram Justiciariis nostris *ad communem legem*, sed coram Admirallis nostris *juxta legem Maritimam* deducantur et terminentur: volentes fieri quod est justum, dictam commissionem nostram sic vobis factam ducimus revocandam. Et ideo vobis mandamus, quod executioni alicui de dicta commissione sic vobis facta, faciendæ omnino supersedentes, vos inde in aliquo ulterius non intromittatis. Teste Rege apud Westm., 11 die Maii. Per ipsum Regem et Concilium." The italics are our own. The important bearing of this Order in Council on the case of the *Franconia* is not in what regards the Court before which the master of the *Franconia* was arraigned, but in what regards the Law, which that Court was asked to apply to an offence committed on the High Seas by a foreigner on board a foreign ship—namely, the Common Law, or custom of the Realm of England.

liamentary Roll No. 30, which has been followed in the edition of the Statutes of the Realm, published under the authority of the Record Commissioners. It is also the reading of a MS. in the British Museum (MS. Vespasian, xxii. in the Cotton Collection), which was prepared with great care for the use of Sir Thomas Beaufort, who was the first person appointed to the office of Admiral for life, and who held that office from 9 Henry IV. to 4 Henry V. (1407-1426). The text of the Statute, as set forth in this MS., has been published in the Black Book of the Admiralty, Rolls Edition, Vol. I., Appendix, p. 413. The other reading, "pointes," rests on the authority of Coke's Fourth Institute, which it is believed was never revised by Lord Coke himself—a fact which is the more probable in this instance, seeing that a case in the Common Pleas (6 Henry VI., Rot. 305) is cited soon afterwards in the same Institute, in which the reading of the Statute is quoted in Latin as "*infra primos pontes*," beneath the first bridges.*

It is to the Admiralty of Sir Thomas Beaufort that we may refer with tolerable certainty the final settlement of the jurisdiction of the Admiralty Court, and the regulation of its procedure. Sir Henry Spelman is an authority that under the Admiralty of John Beaufort, Earl of Somerset, the immediate predecessor of Sir Thomas Beaufort, the business of the Admiralty Court was much increased, and it had cognisance both of Civil and Criminal Causes; whilst the Statute of 2 Henry IV., ch. 11, was passed about the same time, to secure to all persons redress by an action on the case against any exercise of the Admiral's authority contrary to the Statutes passed in the reign of Richard II. What the law was, that was administered in the Admiralty Court at this time, may be gathered from the Articles of the Admiralty Inquisition, which is the last on record in the

* It is to be regretted that in the Report of the Judgment of the Lord Chief Justice of England in the case of the *Franconia*, the reading of "points" has been adopted without calling attention to the erroneous reading of the Statute.

Black Book of the Admiralty, and from a petition recorded in the Rolls of Parliament, in the fourth year of the reign of Henry IV., namely, that "they were the Laws of Oleron and the ancient Laws of the Sea." The Letters Patent of the Admirals are to the same effect, authorising them to do all things appertaining to the office of Admiral, "*prout de jure et secundum legem maritimam fuerit faciendum.*" That the Laws of Oleron were also observed at this time by the Admiral of France is shown by the instructions to the Admiral, published by Fontanon in his *Recueil*, tom. iii., p. 864, and of which a more authentic text has been published for the first time from a MS. in the British Museum, in the Rolls edition of the Black Book of the Admiralty, vol. i., p. 448.* That the same Sea Laws were in use in Flanders may be inferred from a Flemish translation of them, in a hand of the fourteenth century, under their full title of "The Rolls of Oleron of the Judgments of the Sea," which is preserved in the Archives of the Town Hall of Bruges, the centre of Flemish commerce at that time, as well as from the name which they subsequently acquired in Flanders as the Judgments of Damme.† That they were received in the Baltic is a necessary inference from the fact, that they form part of the collection of Sea Laws, known as the Maritime Law of Wisby. That they were adopted in Spain is known from a Norman Ordinance issued by Charles V. of France in 1364, granting to the merchants and mariners of Castile, who traded with the Norman ports, the privilege of having their causes adjudicated "*selon les coustumes de la mer et les droiz de Layron dehors.*" What the Laws of Layron were, may be learnt

* Item le dit Admiral doit administrer justice à tous marchans sur la mer selon les droitz, jugemens, coustumes et usaiges d'Oleron.

† The town of Damme was in fact the port of Bruges at the time, when the estuary of the Zwyn was the entrepôt of the Gascony wine trade with Northern Europe. That great estuary, in which the famous naval victory of the Zwyn was gained by the English fleet in 1340 over the united French and Flemish fleets, is now dry land.

from a MS. in the Royal Library of the Escorial, which contains a Castilian version of the Laws of Oleron under the title "El fuero de Layron." That the same Sea Laws were also received in the ports of Western Italy, may be gathered from an ancient version of them in old Gascon patois, and headed "Asso es la copia deus rolles de Leron de jugemens de Mar," which is preserved in the Archives of the City of Leghorn. In fact the Laws of Oleron embodied the Customs of the Sea, observed by all merchants and mariners engaged in the trade of wine, and of oil, and of salt, between the ports of the Atlantic Seaboard of France and the ports of England and of Flanders and of the Baltic sea on the one hand, and the ports of Spain and of the Western Seaboard of the Mediterranean on the other hand. It is not too much to say that the Courts, which administered these Laws of the Sea to passing mariners of all nationalities, were in the proper sense of the word International Courts, and that the High Court of Admiralty of England, which has been recently transformed into a Division of the High Court of Justice, has transmitted to the new Court its International character with all its International responsibilities.

The connecting links of a continuous chain of mediæval Maritime Law, which may be said to have girt the civilised world in the fourteenth century, are discoverable Southwards in the Sea Laws of Barcelona, which were subsequently embodied in the Book of the Consulate of the Sea, and Northwards in the Gotland Sea Laws, which ultimately acquired the name of the Maritime Law of Wisby, to which reference has been already made. This latter body of mediæval Sea Laws is hardly less famous than the judgments of Oleron, although they were not much known beyond the limits of the Baltic Sea, as long as they existed in MS. These Laws are in fact a compilation of Sea Laws derived from three distinct sources, a Baltic source, a Flemish or Gascon source, and a Dutch source. No ancient MS. text of this

collection of Sea Laws is known to exist in England, although the merchants of the Island of Gotland, of which Wisby is the capital, obtained special trading privileges in England, under a charter from Henry III. (A.D. 1237), the original of which with the seal attached to it is still preserved in the Archives of the City of Lubeck. We have little evidence of the use of these Sea Laws by name in the English Admiralty Courts before the seventeenth century, but they were known in the Admiralty Courts of Scotland as the Wisby Sea Laws* before the middle of the sixteenth century, probably by reason of the intercourse of the Baltic mariners with Scotland being more intimate than with England.

It appears that, under the Tudor Sovereigns of England, the Instance Court of Admiralty held cognizance of charter-parties, affreightments, and maritime contracts made in foreign countries beyond the sea, and although the Common Law Courts had attempted to oust the Admiralty of its jurisdiction in such matters in the reign of Queen Elizabeth, they were not successful until the Stuart Dynasty succeeded to the throne, when Sir Edward Coke, as Lord Chief Justice of the Common Pleas, gave his opinion that, under the Statute 13 Richard II., the Admirals' jurisdiction was confined to things done upon the Sea. Thenceforth a new struggle between the Admirals' Court and the Common Law Courts arose, in which the latter were victorious. Much may be said for the object which Sir Edward Coke had in view, but little can be said for the means, to which resort was had to enable the Common Law Courts to enlarge their jurisdiction beyond its ancient limits, as it was necessary for those Courts to devise legal fictions of an unreasonable character in order to found a "venire" from which a Jury might be summoned; such, indeed, as would revolt

* They are frequently cited under the name of "Wisbie Sea Laws" in the "Practiks," compiled by Sir John Balfour, of Pittendreich, Lord President of the Court of Session in 1563.

the common sense of Englishmen in the present day. The Common Law Courts, however, always refrained from encroaching on the proper jurisdiction of the Silver Oar, and never attempted to extend the operation of the Common Law to the High Sea.

An apt illustration of the deference shown by the Judges of the Courts of Common Law to the jurisdiction of "the Silver Oar," on the High Seas, is furnished in the recent case (1835) of the *Attorney-General v. Tomsett*, reported in 2 Crompton, Meeson, and Roscoe's Reports, p. 175, which was heard before Baron Parke, Baron Bolland, Baron Alderson, and Baron Gurney. It was a revenue case, in the nature of an information for unlawfully unshipping goods in the Downs about two miles from the shore, but within the statutory limits of the Port of Dover. Platt, Counsel for the Defendant, said: "Even admitting that the enactment in the Statute 13 and 14 Car. II., ch. 11, has the meaning contended for, it cannot affect the limits of the Kingdom of England. The Commissioners might have had powers to vary the limits of the ports, but they had no power to alter the ancient boundaries of the kingdom. [Alderson, B.: The Downs are within the ancient limits of England.] Platt: It is submitted that the narrow seas were not part of the Kingdom of England. [Alderson, B.: The authority of Lord Hale* is to the contrary; he says they are within the kingdom.] Platt: No doubt they are part of the dominions of the Kings of England, and so are the Colonies, but it is submitted that they are not part of the Kingdom of England. If they were they would be within some county, but that is not pretended. The jurisdictions of the Admiralty and the Common Law Judges divide between high and low water mark. The warrants of the Chief Justice of the King's

* A reference is made in a note appended by the reporter to Lord Hale's *Treatise de Jure Maris*, ch. 4, but we have searched through the chapter indicated in vain for a confirmation of Baron Alderson's remark.

Bench, which are tested *England, to wit*, are of no authority in the Downs. [Gurney, B.: It is necessary to get the Silver Oar from the Admiralty, in order to authorise an arrest there.]”

The Silver Oar, as an emblem of maritime jurisdiction, is probably peculiar to British Courts, and the Silver Oar of the Admiralty Courts is of great historical value, as a standing memorial of their long-established practice to arrest both persons and vessels on the High Seas. Nothing is known for certain as to the origin of the ancient Silver Oar of the High Court of Admiralty, which is kept in the custody of the Marshal of the High Court; that it was in use in the reign of Queen Elizabeth is a legitimate inference, from an inscription on the base of the stem, the centre of which is sunk, and in the depressed part are engraved the anchor and twisted cable, the peculiar badge of the Admiralty of England, whilst round the raised edge, which encircles the anchor and cable, is the legend “Jasper Swift, Marshall of the Admiralte.” This name at once carries us back to the twenty-eighth year of the reign of Queen Elizabeth, in which year there are several warrants recorded in the Admiralty Rolls, which are addressed to Jasper Swift, then Marshal of the High Court, in the name of Charles, Lord Howard, Baron of Effingham, at that time High Admiral of England. There are, however, other symbols on the oar, which carry its history further back. There is, for instance, embossed on the blade of the oar, which has the shape of a paddle or ancient steering oar, an heraldic shield bearing the arms and supporters of King Henry VII., and as the shield has the appearance of having been superposed on the blade, its presence is not inconsistent with the oar being of still higher antiquity, and it has been conjectured from the *annuli* or knobs, which encircle the stem and divide it into three parts, and in respect of which it resembles the Silver Oar of the Admiralty of the Cinque Ports, that a portion of the stem may be Edwardian; we say a portion of the stem, as the upper part of it has been renewed as

recently as in the reign of George III., probably by reason of its having been worn away by friction against the shoulder of the Marshal, who carries it as Serjeant-at-Mace, on all occasions when he attends the Judge. On the other hand, the Silver Oar of the Admiralty of the Cinque Ports is in form and size very similar to that of the High Court of Admiralty of England. It is probably the more ancient of the two oars. It has no shield of arms engraved upon the blade, but simply an anchor with two cables, in like manner as the oar of the High Court has an anchor with a twisted cable, the badge of the High Court, engraved on the upper part of the blade. There was a tradition in the Registry of the High Court of Admiralty, when it had its home in Doctors' Commons, that there was formerly a little silver oar, which the Marshal or his deputy carried with him as the symbol of his authority, when he had to execute a warrant of arrest against persons or vessels on the High Seas. The practice in the present day is for the officer of the High Court, when he proceeds to arrest a person or a vessel on the High Seas, to carry with him a small circular staff surmounted with a silver crown, below which are engraved on a silver plate the anchor and twisted cable of the Admiralty. If it is permissible to reason from the practice of inferior Courts on such a subject, *si parva licet componere magnis*, the ancient practice of the water-bailiff of the town of Dover may be cited as instructive. There is, for instance, preserved in the Archives of the Corporation of Dover a little silver oar, the stem of which is fitted into a brass circular tube in such a manner, that a brass case or cover may be screwed on to the tube, so as to conceal the oar from sight. The silver oar itself, in this instance, has engraved on it an anchor and cable, whilst the outside case is surmounted with a crown, below which a similar anchor and cable are in like manner engraved. When the cover is screwed on, the entire instrument has the appearance of a

constable's staff. The tradition at Dover is that the water-bailiff of the Corporation could not in law, and did not in fact, proceed to arrest any person on board ship without the Silver Oar. It seems probable that the little circular staff surmounted with a crown, which is used at the present time by the Deputy Marshal of the High Court of Admiralty as the emblem of his authority, was itself originally a Deputy of the little silver Oar, and was used when the little silver oar itself was otherwise engaged, and it has now come to do duty at all times for its Principal, since the time when the latter has been missing from the Archives of the High Court.

The Silver Oar of the Admiralty, and it may be observed that every Vice-Admiralty Court has its Silver Oar, is, as already remarked, of no slight historical value, as evidence of a long-established practice of the Admiralty Courts to arrest persons and vessels on the High Seas, which as between Nations has become on the one hand a duty on its part, and on the other hand a right. But within what limits is this right exerciseable by the Admiralty Courts in civil matters? We incline to the opinion that the jurisdiction of the Silver Oar of the Admiralty was originally co-extensive with the Law Maritime, and that the right of the Admiral to arrest for an offence against the Common Law of the Sea was co-extensive with the High Sea itself. For instance, the only *crime* known to the Common Law of the Sea is the crime of Piracy, and the right to arrest a pirate is exerciseable by the Admiral and his officers in every part of the High Seas. The right to arrest in this case travels wherever the Criminal Law of the Sea travels. But various *delicts* are also known to the Law Maritime, and although the primitive Jurisdiction of the Admiralty, as regards many of such *delicts* has become obsolete,* there

* Such was the opinion given in 1796 by Sir William Scott, King's Advocate, Sir John Scott, Attorney-General, and Dr. Battine, Admiralty Advocate. Their opinion is printed in the Appendix to Browne's Admiralty Law, vol. ii., p. 519.

is good reason to suppose that the Courts of the Admiral in every country took at one time cognisance of all such *delicts*, no matter where they were committed on the High Seas, or under what flag the vessels, that might have been instrumental to such *delicts*, were navigated. We have elsewhere observed that the institution of the office of High Admiral of England was originally intended to secure a more efficient maintenance of naval discipline in time of war; but such an office would have met with the fate of the High Constable's Office in England, long before this latter office was suppressed, if its authority had not been turned to useful account in time of peace, by the Crown undertaking through the Admiral's Office to administer the Law Maritime *ad instantiam partis*, and to enforce the decisions of the Admiral's Court in questions of maritime *tort* against the wrong-doer, no matter what might be the nationality of the mariner or of his ship. We have little doubt that the Admiralty Rolls in the Record Office, if they were searched, would furnish abundant proofs that before the Tudor period the Admiral of England, at the instance of parties, was accustomed to issue his mandate to his Marshal or other officer to arrest goods* on board of foreign ships anchored on the High Seas off the coast of England, and to arrest foreign ships themselves as well as foreign mariners anywhere† on the High Seas for trespasses committed against *the Law of the Sea*. The exercise of this jurisdiction as regards foreign mariners has long been obsolete, whilst

* The record of an arrest of goods on board of a Prussian ship in Kirkley Roads, at the instance of a party under a warrant from John, Duke of Exeter, High Admiral in the reign of Henry VI., is preserved, amongst other documents, in the Black Book of the Admiralty, vol. i., p. 259. Kirkley Roads is described by Lord Hale, in his *Treatise de Portibus Maris*, ch. 5, "as a great precinct of the sea, being five miles in the main sea."

† A precept from the same High Admiral, issued during the reign of Henry VI., is preserved in the same volume of the Black Book, p. 250, under which the Marshal is ordered to arrest certain alien masters of ships with their vessels and cargoes, wherever they might be found, and to bring them before

the exercise of it as regards foreign ships has become restricted within such a distance from the coast, that the arresting officer may be under its protection at the time when he makes the arrest, in other words, may be within the limit of a geographical league seawards from the coast, such being the utmost distance at which it was supposed, before the present century, that a nation could exercise effective control by its cannon on shore over vessels on the open sea. How and when the precise distance of three miles from the coast came to be generally accepted by nations as the boundary, beyond which the aid of the process of their Maritime Courts could not be reasonably invoked to enforce the Law of the Sea, is not very clear. We had hoped at one time, that instruction on this subject might be found in the records of the Admiralty Court of the Cinque Ports, which, up to a very recent period, exercised by prescription a jurisdiction over the High Seas within a limited distance from the coast of Kent and of Sussex, to the exclusion of the jurisdiction of the High Court of Admiralty of England. The Records* however of the Admiralty Court of the Cinque Ports do not appear to supply any definite information as to the limits of its jurisdiction, as an Instance Court. Dr. Arthur Browne, Professor of Civil Law in the University of Dublin, says, in the course of his lectures on the Law of the Admiralty, published in 1802, "As to the limits of the Cinque Ports jurisdiction, I am not ashamed to say, I am uninformed, since I have seen late opinions of great

the Admiral or his Lieutenant at Cromer, in Norfolk, to answer a complaint of trespass committed by them against the Law Maritime, and as this warrant is addressed to all masters and mariners of ships as well as to the Marshall, the latter officer had thereby authority to invoke the aid of all vessels and their crews on the High Seas—*ubilibet*, wherever he might need them.

* The Records of the Cinque Ports were formerly deposited in Dover Castle, but they are now for the most part lost or destroyed, at least, such is the account given of them by William Boys, F.S.A., in his notices of the Cinque Ports, published at Canterbury in 1792, with extracts from the registers going no further back than 1598.

English civilians making the same acknowledgment." It appears, however, from a case reported in 2, Haggard's Admiralty Reports, p. 438, which was heard on December 23rd, 1831, before the late Dr. Joseph Phillimore, then Judge of the Admiralty of the Cinque Ports, and in which the High Admiral of England and the Admiral of the Cinque Ports contended by their advocates for the body of a dead whale, as a perquisite of office, the learned Judge assumed, without hesitation, that the Admiral of the Cinque Ports had jurisdiction over the three-mile zone of sea adjoining the coast of Kent, the fish having been discovered within three miles from the shore,* and adjudged the spoil to the Admiral of the Cinque Ports. It must be noted, however, that this was a domestic dispute, in which no foreign interest was concerned, and it is only of importance as regards the particular distance of three miles, which can hardly have rested on a prescription coeval with the jurisdiction of the Lord Warden of the Cinque Ports.†

As far as we are able to trace our way in the darkness which surrounds the question, we think that the first germs of the doctrine of "jurisdictional

* The Jurisdiction of the Admiralty of the Cinque Ports was found by an Inquisition taken at a Court of Admiralty held by the Seaside at Dover, 12 June, 1682, to extend from Shore beacon in Essex, to Redcliffe in Sussex, near Sleaford. With regard to its extent seawards, nothing is said in that Inquisition, and Sir Leolyn Jenkyns, in his charge at a Sessions of the Admiralty, held within the Cinque Ports in 1668, assumed that the gentlemen of the Jury were acquainted with the Jurisdiction of the Admiral on the High Seas within their franchises.

† That the theory of a zone of neutral waters in respect of any portion of the High Seas, had not been thought of, when the Admiral's Jurisdiction was first established, may be gathered from a curious case, the pleadings of which are preserved in the Archives of the Corporation of Yarmouth, and which was decided in 31 Edward I. War was at that time being carried on between France and Flanders, when certain Frenchmen seized by force of arms a Flemish ship called the *Bliburgh*, which was anchored to the shore in Kirkley Roads, to the southward of Yarmouth. The *Bliburgh* was sold by her captors to a merchant of Calais, who brought her subsequently in the course of trade into the

waters,"* as distinguishable from that of "territorial waters," is discoverable in the proclamation of King James I., of 1604, the text of which has been set out by Selden, for another purpose, in his treatise on the Dominion of the Sea, ch. xxii. We ought, however, to premise that in using the phrase, "jurisdictional waters," we have in view the doctrine of "control" as distinguished from that of "possession," the latter being inconsistent with the principle of the open sea being "*nullius territorium*," whilst "control" admits of degree, and may be exercised under conditions perfectly consistent with the innocent use of the sea by all vessels.

"Our pleasure is that within our ports, havens, roads, creeks, or other places of our dominion, or so near to any of our said ports and havens as may reasonably be construed to be within that title, limit, or precinct, there shall be no force, violence, or offence suffered to be done, either from man-of-war to man-of-war, or man-of-war to merchant, or merchant to merchant of either party. But that all, of what nation soever, so long as they shall be within those our ports and places of our jurisdiction, or where our officers may prohibit violence, shall be understood to be

port of Yarmouth, where she was arrested on behalf of her former Flemish owner on a plea of wrongful trespass. The Flemish owner alleged that the *Bliburgh* was anchored to the shore "in terra pacis et infra potestatem Regis Angliæ" at the time of her seizure. The French purchaser alleged that she had been captured from enemies on the High Seas in time of war. The Inquest found that the ship had been taken, when she was in the dominion of the King of England, anchored to the dry land, from which the captors had raised her anchor when they carried her away. Therefore it was considered that the Flemish owner should recover his ship with damages.

* Mr. Justice Story has adopted the term "jurisdictional waters" in his judgment in the schooner *Famy*, 3 Mason's American Reports, p. 152. We have ourselves endeavoured to popularise the expression in a work on the Law of Nations in Time of Peace (Oxford and London, 1860), and Sir E. Creasy, in his First Platform of International Law, p. 271, recently published, holds the term to be convenient as distinguishing the open sea within the three-mile limit from parts of the sea "*intra fauces terræ*," which may be quite correctly termed "the territorial waters of a State."

under our protection, to be ordered by course of justice, and be at peace each with the other."

It would appear from this proclamation, that the wise councillors of King James I. had in view two principles to guide them, as to the extent to which they should assert the right of the King to maintain the peace of the seas adjoining his Realm, when other nations were at war; namely, that the distance seawards from the King's ports and havens should be a reasonable distance, and that it should be such a distance, that it would be possible for the King's officers always to prohibit violence within it. The three-mile zone of open sea, which has come to be adopted by the general consent of nations, as the limit within which a neutral nation is entitled to forbid belligerent cruisers to carry on operations of war against enemy's vessels, satisfies both of these conditions, and as its purpose is benevolent, nations have readily acquiesced in the principle, which Bynkershoek has embodied in the proposition, "*unde dominium maris proximi non ultra concedimus, quam illi imperari potest, et tamen eo usque.*"

Many persons have been misled by the terms in which this proposition of public Law is frequently stated—namely, "*Ibi dominium finiri, ubi finitur armorum vis,*" to suppose that it asserts on behalf of all nations a right of paramount empire (*dominium eminens*) over the high seas within the distance of a cannon shot from their shores. But the term "*imperium*" has not necessarily such a meaning. The distinction drawn by Ulpian between the "*merum imperium*" and the "*mixtum imperium*" is well known. "*Imperium aut merum aut mixtum est*" are the words of the great Roman jurist. "*Merum est imperium habere gladii potestatem† ad animadvertendum in facinorosos homines, quod*

† In the market-place of the ancient Hanseatic city of Bremen, in front of the Rathhaus, is a Rolands Skule, a Roland's Column, being a stone column about eighteen feet high, carved into the figure of a man standing under a canopy, with a drawn sword in his right hand and a shield on his left arm,

etiam potestas appellatur. Mixtum est imperium, cui etiam jurisdictio inest, quod in danda bonorum possessione consistit" (Dig. L. 11, Tit. 1, sec. 3). What the character of the "imperium" is, which is exercised by nations in maintaining the neutrality of the seas adjoining their coasts, may be gathered from the general practice of nations. The neutral State does not assert any criminal jurisdiction over the belligerent captor; it simply restores to the vanquished party the captured vessel, if it should be brought within its ports, or it claims in the Prize Court of the captor, on its own behalf, the restitution of the vessel to the party, who has been deprived of it. On the same principles of reasonableness and feasibility, the three mile zone of sea is recognised by all nations, as the limit within which every independent State may exercise control over foreign vessels in matters of trade for the protection of its own maritime revenue, and in matters of health for the protection of the lives of its own people. Some nations, indeed, insist practically on a broader zone for the protection of their maritime revenue, but such claims give rise to frequent controversy with other nations, whose merchant ships may have been seized by coastguard cruisers at a greater distance from the coast than a maritime league.

Since the judgment of "the Court for the Consideration of Crown Cases Reserved" has been pronounced in the case of the *Queen v. Keyn* (the *Franconia*), a Bill has been brought into the House of Commons by private Members, and has been ordered to be printed, which purports by its title to be of a declaratory character, but which in fact enacts that "the portion of the High Seas, which lies within a distance not exceeding three miles from the sea-coast of

whilst under his feet are the head and hand of another man. These columns, which are preserved in several towns of Germany, are significative of the grant to those towns in the ancient time of the Holy Roman Empire of the Germans of the "merum imperium," the power of life and death in criminal causes exercised by their own magistrates.

any territories, which are now or may hereafter become subject to Her Majesty, her heirs or successors, constitute part of the dominions of Her Majesty, except where the limits of Her Majesty's dominions are or shall be otherwise defined by some express law or treaty." We cannot but think that this Bill has been prepared under a misapprehension of the observations made by the Lord Chief Justice of England in the case of the *Franconia*. His language, as set forth in the authorised Report of the judgment, recently printed in the Law Reports of March 1, 1877, is as follows:—

"If, by the assent of other nations, the three mile belt of sea has been brought under the dominion of this country, so that consistently with the right of other nations it may be treated as a portion of British territory, which, of course, is assumed as the foundation of the jurisdiction, which the Courts of Law are here called upon to exercise, it follows that Parliament can legislate in respect of it. Parliament has only to do so, and the Judges of the land will, of course, as in duty bound, give full effect to the law, which Parliament shall so create."

It will be seen from the language used by the Lord Chief Justice of England, that he assumes as a condition precedent to any such legislation, as that which is contemplated in the Bill above-mentioned, that the assent of other nations should have been previously given to the annexation of a portion of the High Seas to the dominions of the Queen. The Bill, however, is not conditional, like the Merchant Shipping Act, which has authorised British Courts of Maritime Law to apply the new Sailing and Steering Rules to foreign vessels on the High Seas, only after the assent of the nation, under whose flag any such vessel is navigated, has been given to such rules.

It has been observed by Chancellor Kent, in his Commentaries on American Law, when he treats of the Law of Nations, vol. i., p. 30, that, considering the great extent of

the line of American coasts, the United States have a right to claim for fiscal and defensive regulations a liberal extension of Maritime Jurisdiction; and that it would not be unreasonable to assume, for domestic purposes connected with their safety and welfare, the control of the waters on their coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi. "It is," he says, "certain, that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime Powers, the use of the waters of our coast far beyond the reach of cannon shot, as cruising ground for belligerent purposes. In 1793, our Government thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist beyond the distance of a marine league from the sea-shores; and, in 1806, our Government thought it would not be unreasonable, considering the extent of the United States, the shoalness of the coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare between that limit and the American shore."

These remarks of the learned Chancellor may be in themselves not unreasonable, and, with the assent of other nations, may possibly have practical effect given to them, as was, in fact, attempted on a slighter scale by the Treaty of 1806 between the United States and Great Britain, in what concerned their mutual respect for each other's neutrality. By that Treaty—which was signed at London on 31st December, 1806, but which was never ratified, and therefore remains inoperative—it was agreed that in all cases, where one of the contracting parties should be engaged in war, and the other should remain neutral, the belligerent party should not stop the vessels of the neutral party, or

the unarmed vessels of other nations, within *five* marine miles from the shore of the said neutral party, provided that the said stipulations should not take effect in favour of the ships of any nation, which should not have agreed to respect the same line of maritime jurisdiction. The contracting parties also agreed to enforce mutually the observance of the new "line of respect," but only against such nations as should have previously become assenting parties to the Treaty.

It will be seen from the cautious language of Chancellor Kent that he contemplated only an extension of the "control" exercised at present under the general Law of Nations by the United States of America over the Seas adjoining their coasts for the protection of their own neutrality. He has not ventured to suggest that the American Congress should annex of its own authority the High Seas as far as the Gulf Stream to the dominions of the United States. It will also be seen that when the United States and Great Britain agreed by the Treaty of London of 1806 to adopt a mutual extension of what is termed the "Line of Respect" in time of war to five geographical miles, in place of the generally-accepted line of three geographical miles, they carefully provided that the innovation on the general Law should not operate in respect of other nations except with their express consent. Sir George Bramwell has well observed, in his Judgment in the case of the *Franconia*, as he passed in review the possible consequences of the Court deciding in that case in favour of the Crown, "The right we should claim, we must concede to other nations." If Great Britain may rightfully annex by Act of Parliament the High Seas within three miles of her coast to the dominions of the Queen, why may not the United States of America annex, by an Act of Congress, to the territories of the Union the High Seas within three miles of their coasts? If three miles is allowable, why should not three times three miles be allowable, which is

the distance proposed by Mr. Dudley Field, in his Outlines of an International Code, as a reasonable distance in the present day, inasmuch as cannon shot can now be sent more than two leagues? * It is useful to submit any suggested innovation on the settled practice of nations to the test of reciprocity. England, we venture to think, would be startled—we might almost say convulsed—if the electric wire, which connects the two hemispheres in friendly intercommunion of thought and action, should suddenly flash across the Atlantic the tidings, that a Bill had been tabled in the House of Representatives at Washington, enacting, that “the portion of the High Seas, which lies between the Gulf Stream and the seacoast of the United States constitutes part of the dominions of the American Union.” Yet such a Bill would be practically less unreasonable, than the Bill which is now on the table of the House of Commons, for it would not interfere with the free navigation of the Gulf Stream itself, the most convenient maritime highway for vessels of all nations, navigating along the North American Coast from the southernmost point of Florida to the Great Bank of Newfoundland. On the other hand, the Bill, which is now on the table of the House of Commons, if it were to pass into a Law, would constitute the Downs a *municipal* roadstead, which Lord Stowell has pronounced to be a common passage and highway to the German Ocean (*The Neutralitet*, 6 Ch. Robinson, p. 34); while it would arrogate to England a right, whenever the Government of the Queen should be so minded, to forbid to the vessels of other nations the use of the most convenient part of the narrow Channel, which is the only Maritime Highway,

* The subject of the extension of the neutral zone of sea beyond the limits of three miles to five miles, or even as far seawards as eight miles, has been recently mooted on behalf of the United States by Mr. Seward in a correspondence with the British Legation, at Washington, in 1864, since made public.

by which the commerce of Northern Europe can be brought into direct connection with the commerce of half the countries of the Civilized World.

TRAVERS TWISS.

II.—LAW AND FACT.

NUMBERLESS writers of every age and country have laid down the proposition that every disputation proceeding in a court of justice resolves itself into two parts:—first to ascertain the facts of the case, and then to apply the rule or rules of law which govern it.

This classification, though universally adopted, is one to which reference is more frequently made in England than elsewhere, because the Jury system which enters so largely into our administration of justice is generally said to be based upon this classification. It is the function of the Jury (we are told) to ascertain the Facts, whilst it is the function of the Judge to determine and apply the Law. Any confusion of law and fact would, it is supposed, lead to a collision between judge and jury: no such collision takes place, and this is considered as a proof that the separation is complete.

Before I proceed to examine whether this separation is as complete as represented, I wish to take a preliminary precaution against confusion of language: for it is not possible to examine accurately the differences which govern a classification, unless we first assign accurate meanings to the terms in which the classification is expressed.

What is "Law" has been the subject of most elaborate investigation. Austin, in his *Province of Jurisprudence*, has determined the meaning of "Law" to be a rule set by a political superior to political inferiors and enforced by a sanction.

A question of law, therefore, will be a question as to what rule the political superior, otherwise called the sovereign authority, has laid down on a particular subject.

The term "Fact" has never been subjected to the same rigorous analysis, and I would, therefore, rather not pledge myself to any final definition of what a fact is. It will be sufficient for my present purpose to take the definition given by a recent learned writer (*Stephen's Digest of the Law of Evidence*, p. 1), who declares a fact to mean "(1) everything capable of being perceived by the senses; and (2) every mental condition of which any person is conscious."

It has been frequently pointed out that the inquiry—what command has been issued by the sovereign authority—falls within the definition of fact as given above. But in a discussion like the present it would be most inconvenient to substitute a long periphrasis for a single term, and I do not know how this is to be avoided except by asking the reader to bear in mind, that by questions of fact I mean all questions of fact except those of one particular kind—namely, those which are also questions of law.

With this preliminary explanation, I shall proceed to examine the distinction between questions of law and questions of fact by taking one or two particular examples of its application. And let us take one of the commonest questions which arise in a court of justice—the construction of a document. Is this a question of Law or of Fact, according to the above definitions of those terms?

Before attempting to answer the question, I will dis-embarrass the inquiry of one or two complications. The surrounding circumstances, as they are called, that is, the circumstances which existed when the document was drawn

up, and with reference to which it was drawn up, are always to be looked at when construing the document, and of course the inquiry what these circumstances were is a question of fact, if they are in dispute. So also the authenticity of the document is a question of fact, if not admitted. I will assume, however, that on these questions there is either no dispute, or that the dispute has been settled. Is the question of construction which presents itself after this elimination a question of law or a question of fact?

To the question so put the logical answer ought I think to be as follows:—the writing is evidence of intention; the question really submitted for decision is, what did the parties whose language is under consideration intend? This is a question as to a person's mental condition, and that, according to Sir James Stephen's definition, is a question of fact.

Suppose however that the matter is put thus:—Is the construction of a document a question for the Judge or for the Jury? Bearing in mind the supposed relative functions of judge and jury, the two questions ought to be identical, and the logical answer must be—it is a question of Fact for the Jury.

We know, however, that no such answer as this is given in those courts of justice, where judge and jury join in the administration of the law. We know that universally the Judge takes questions of construction clean out of the hands of the Jury, and decides them himself; nor does he allow that he thereby encroaches upon functions which do not belong to him: questions of construction, when it has to be ascertained who is to decide them, are always *assumed* to be questions of law.

No doubt the sovereign authority can attribute and sometimes has attributed certain legal consequences to the use of certain language, whether the parties intended those consequences or not: so also even where the sovereign authority has not directly interfered, there are what are

called "technical expressions" to which the traditions of lawyers, adopted by judges, have appropriated certain fixed meanings. These and some few other rules of construction which have grown into use, are for the most part rules of law proper. In such cases, no doubt, apart from the question of fact—what language has been used—the only other question—what duty or obligation the language creates, modifies, or declares—is correctly treated as a question of law. But strike out these cases from the list: still the Judge never hesitates in the cases which remain to take upon himself to decide the question of intention.

The matter might present itself in a somewhat different aspect were the construction of a document that which it once was—a rigidly strict and literal interpretation of the instrument itself, and not a search *through* the words for the intention of the parties. The grammatical method of interpretation has however given way entirely to the logical; and the logical method has extended the basis of its inferences beyond the four corners of the instrument itself. Whatever remnants of the old language may survive, there is no doubt that modern judges do really collect the intention of the parties from evidence of which the writing forms the chief, but not the only part. If it is inaccurate to call this a question of construction, it is an inaccuracy of established language.

I have purposely spoken only of documents. Whether the course taken in Courts of Common Law when dealing with oral manifestations of intention is precisely the same, is not easy to determine. The functions of the Judge and Jury are not here so markedly distinct. The words are very rarely ascertained with such absolute certainty as to enable the Judge to separate and to reserve to himself exclusively the question of construction; and whether they be so ascertained or not, it is always difficult to say whether the Judge in giving his opinion to the Jury is (to use his own phraseology) "putting a construction upon the words"

which he bids them to accept, or advising them how he would, were he in their place, draw the inference as to intention. The friendly and confidential mode in which a judge generally addresses a jury renders it very often unnecessary for him to disclose upon which of these two grounds he is proceeding.

If indeed the stage at which the Judge and Jury co-operate in settling the matters in dispute—the *trial* as it is called—were the last in the proceedings; if, after the verdict of the Jury were given, the matter were at an end, it would very likely have happened that the question of “construction,” even where the intention had been expressed in writing, would not have been so exclusively appropriated by the Judge as it is now. The Judge, in imparting his view to the Jury, would very likely in this as in other similar cases, have hovered between direction and advice. And even in the case of explicit direction there would be no certainty that the direction would be followed. But the trial at Nisi Prius is not the conclusion of the proceedings. There is a later stage from which the Jury are entirely excluded, and where the authority of the Judge is supreme. By applications to the Court sitting *in banco* at Westminster Hall after the trial is over the result of the trial may be neutralised, or even completely changed. A new trial may be ordered, the judgment may be arrested, or the verdict may be entered in the exactly opposite way to that found by the Jury. And thus it is placed beyond doubt that the question of “construction,” though it is, as we have shown, really a question of fact, is reserved entirely to the Judge, and is by him treated as a question of law.

Let us turn now to another region—that of custom. I do not desire to enter here upon the difficult enquiry—by what process custom generally grows into law; that does not, at this moment, press for consideration. I only desire to observe that there is a very large number of cases in which it is considered that the custom of a particular class,

port, market, or trade, annexes certain incidents to every contract made in the place where, or by the persons amongst whom, the custom holds, unless the custom is excluded by the actual terms of the bargain. The effect of this has been described to be that the contract must be read with a clause containing the terms of the custom added to it. In construing contracts of this class, therefore, we are simply brought back to a question of intention, which is, according to our definition and the explanation already given, strictly speaking, a question of fact, namely, what is the custom? and how far and in what manner does it modify the other terms of the contract? How this question has been actually treated in Courts of Common Law could not be now stated in any reasonable compass. I shall, however, be able sufficiently to attain my present purpose if I give one example. Amongst the widest and most general of such customs are those which relate to Bills of Exchange. To this particular class of contracts, incidents have been annexed by custom which do not belong to other contracts relating to the payment of money. Some of these incidents are now so well established, and their operation is so extensive and precise, that we are apt to forget their origin. Let us trace one of them to its source. We find that in a case tried before Lord Mansfield, the question arose whether a bill of exchange drawn payable to order, and endorsed to a particular person without the words "or order" was negotiable. Strange as it may now seem, five witnesses, including the cashier of the Bank of England, a well-known banker, and a "very eminent and experienced merchant," deposed to the effect that according to the custom of merchants, a bill of exchange so endorsed was *not* negotiable. Lord Mansfield then told the Jury that by the general law the bill was negotiable, but that, if they were satisfied that there was a particular usage to the contrary, and that by the custom of merchants and traders the bill

was not negotiable, they might so find. They did so find, and the verdict was entered for the Defendants. But the verdict was afterwards set aside by Lord Mansfield himself upon this remarkable ground—that the general law as to the negotiability of bills of exchange so endorsed was settled, and could not be contravened by the usage of merchants, *evidence of which ought not to have been received!* When one reflects that the negotiability of bills of exchange is itself founded on the custom of merchants, one sees that this was a pretty strong decision, and probably few judges, except Lord Mansfield, would have ventured so far. How it is to be reconciled with the ordinary view of the respective functions of judge and jury it is difficult to imagine: and yet it never seems to have struck any one that the Jury had been improperly treated.

These instances serve to show that, whatever else may be the value of the separation of questions which arise in a Court of Justice into questions of fact and of law, the separation is not, in practice, very rigidly adhered to. But of course it will be understood that cases in which Judges have transgressed or re-adjusted the boundaries which separate their province from that of the Jury, are not quoted merely to show that such a transgression or re-adjustment has taken place. This displacement of functions has in itself no interest whatsoever for us in the present inquiry. Were the Jury system wholly or partially abolished, the lines of demarcation between fact and law would not necessarily be affected. What I want to find out is, whether or no this classification is correct, and if not, how it may be amended. Except as throwing light upon this inquiry it is indifferent to me now whether or no in some instances the terms have been misapplied, or, whether the Jury have been excluded from their strictly proper functions.

The present interest of these examples consists entirely in the fact that the transfer of functions from the Jury to

the Judge has always resulted in an important change in the mode in which the questions to be dealt with are disposed of; and it is the precise nature of this change to which I wish to draw attention. The Judges in deciding questions of intention or of custom might, no doubt, had they so chosen, have treated themselves simply as substituted *quoad hoc* for the Jury. This they have occasionally done, and this would have been the more correct course, if they did anything at all. But in most cases it would have been too glaring a usurpation for judges to take questions into their own hands and deal with them boldly as questions of fact. Another course was to lay down fixed rules of presumption as to these questions, in other words, fixed rules of law, and so to have eliminated altogether the question of fact; and this judges have done to a considerable extent. To do this was not beyond the functions of judges as traditionally understood; and questions of intention and questions of custom have by means of judicial decision come thus to be, in some cases, pure questions of law. Rules have been laid down relating to these matters as firm and rigid as any Act of Parliament. In this class of cases, therefore, there is no confusion of things, nor even of names, and they need not be further considered. But as to many questions which arise, and which are dealt with by judges, whilst no such strict rules have been laid down as will enable us to say that they have been transferred to law, they nevertheless do not remain pure questions of fact. Not only does the Judge instead of leaving them to the Jury decide them himself, but he decides them upon considerations differing materially from those upon which he would decide them were he sitting upon a jury. I need not stop to illustrate this. It will be apparent to any one who has studied, even superficially, the proceedings of our Courts of Common Law, and some examples of it will be given in the ensuing pages. The result is that the questions so dealt with occupy precisely

that doubtful region between fact and law, the existence of which I desire to bring under observation.

Litigation in Courts of Chancery is carried on in a different manner ~~to~~ ^{from} that in Courts of Law. There is in those Courts no separation of functions between several persons forming one tribunal. The Chancery Judge sits upon the whole case, and decides both upon law and fact. And what is most important, not only does the same individual decide all the questions which arise, whether they be law or whether they be fact, but he is not called upon to make any further separation of those questions than he finds convenient in order to express the reasons for his decision, so far as he chooses to express them. It is, therefore, not always easy to say how a particular question has been treated, whether as law or as fact. Still we may, with a little searching, discover here also the same debatable region which cannot be decisively assigned either to law or fact. For example, take the question which so often arises in Courts of Chancery, whether a purchaser has notice of an encumbrance. Notice, of course, means knowledge; and there has been no direct attempt to deny that this is a question of fact. But there has been a strong and persistent attempt to lay down rules as to what constitutes evidence of notice. This, if successful, is, of course, in reality a round-about way of altering the law as to notice. When a man says to me that henceforth, under all circumstances, upon certain facts being proved I shall be presumed to know a thing, he really says that consequences, which formerly only resulted from knowledge, shall now result from circumstances other than knowledge. Now if the only result of this were to make some alteration in the law of notice, and to introduce a new and definite thing called "constructive notice," or "notice in law," or by some such name, there would be nothing whatever in this germane to our present purpose. Judges, though they generally try to conceal it, do make law to a very large extent. But here

again that to which I wish to draw attention is, not the making of new laws, but the state in which the decisions very often leave the questions to which they relate. It frequently happens that whilst, on the one hand, the Judge cannot ask himself the simple question—did or did not the purchaser know this? he cannot, on the other hand, substitute for it any other definite and precise question whatsoever. He cannot say, there are *no* rules, therefore this remains a pure question of fact; nor can he say there *are* rules, therefore altogether, or to this extent, it is a question of law. He poses it before himself as a question of fact; but turns away almost immediately from the evidence given in the case before him to the decisions of other judges in other cases; and this, not merely to see how far he may guide his own judgment on the facts by that of his predecessors, but to consider how far their opinions impede and restrain him, and to what extent they force upon him conclusions which the evidence itself which he has before him fails to establish.

These examples serve to show how, before the tribunals with which we are most familiar, questions arise which cannot be assigned accurately either to fact or law. I now desire to examine the classification under consideration from a somewhat broader point of view.

If we ask ourselves what people mean when they say that every process in a Court of Law divides itself into the two operations of ascertaining the facts of the case and of applying the rule or rules of law by which it is governed, it will I think be found that what is generally understood by ascertaining the facts, is hearing the narrative of the parties, their agents and witnesses, and forming an opinion as to the truth of that narrative. Further, it is generally conceived that all the rights belonging to the individual members of society, and all the duties and obligations which others owe to them have been defined by the

sovereign authority. So that when the truth of the statements made has been once ascertained, the law lies ready for application to the resultant facts. Take, for example, a suit or prosecution involving questions of ownership, pledge, trespass, trover, theft, or the like. No one seems to suspect for a moment that, when the allegations of the parties have been ascertained to be true or false, anything more remains to be done than to apply the law. There may be difficulties in ascertaining what the rule of law is, but when ascertained it is by its very nature clear, rigid, and precise. No one seems to suppose that between these two processes—the ascertainment of the facts and the ascertainment of the law—there lies a third process wholly distinct from either. The popular understanding and the language current among lawyers are quite in accord in this respect. This view of legal proceedings is, in fact, one of the modes in which the above proposition about the separation of all litigious questions into law and fact has been arrived at.

It is only when we come to examine the matter more closely that we see how little the reality corresponds with the conception. I have in another place (*Elements of Law*, ch. v.) examined as carefully as I could the current language by which our ordinary rights and duties are expressed. I have shown there that every rule of law must express directly or by inference a primary duty or obligation. If law be manifested, as it often is, in the form of a secondary or sanctioning duty or obligation, yet it presupposes the existence of the primary duty or obligation which it is intended to enforce, and Courts of Justice cannot escape from ascertaining this primary obligation in every suit or prosecution which comes before them.

Nevertheless, try what we will, we very frequently cannot push the expression of the primary obligation further than—thou shalt conduct thyself with honesty, with prudence, with reasonable care, reasonable skill or the like; or putting it the other way—thou shalt not be negligent, thou

shalt not be unskilful, thou shalt not be dishonest, thou shalt not be imprudent.

Now it cannot be said here, as it is in some cases, that the expression of its will by the sovereign authority is manifestly incomplete, and that the Judges must fill up the gap as best they may. The law, though scanty, is not incomplete. It has spoken as far as it chooses to speak, and has left the final expression of certain duties in this form.

Now let us see how the Judges have dealt with rules of law which are so expressed.

In the first place they have said, upon all occasions when it is considered necessary to separate their functions from those of the Jury, that whether a man has been honest, skilful, prudent, diligent, or the like, is not a question of law, but a question of fact ; and where there is a jury that it is to be decided by the Jury, and not by the Judge.

How far judges are correct in saying that such questions are questions of fact I will not at this moment consider. This assignment of functions, if boldly and consistently followed, would lead to no confusion. But having laid down this fundamental rule, the Judges almost invariably proceed in a round-about way to undermine it. Take the question of negligence, the commonest of all. True it is, that in Courts of Common Law the Jury are always asked to find as a fact whether the Defendant was guilty of negligence. Suppose they find that he is so ; does that settle the matter ? Not always. The Judge or Judges afterwards, for themselves, and without the assistance of the Jury, very often proceed to consider, whether, when twelve men have unanimously stated their conviction that there was negligence, there was after all any evidence of negligence at all. Now this is a very ambiguous expression. It might raise the question—was the verdict of the Jury right ? Did they draw the right inference from the facts before them ? And some judges have even avowed that to consider whether there was any evidence for the Jury

"obliges the Court to weigh the facts." This view of the matter leads obviously to a revision of the verdict of the Jury by the Judges *in banco*; in short, to something scarcely distinguishable from an appeal from the verdict of the Jury.

The other view of the proceeding is that it raises the question—whether a particular act of omission or commission is evidence of negligence. It is a very short step from this (if indeed it is not precisely the same thing) to inquire whether a particular act or omission is itself negligence, in other words, to inquire what is the conduct which the law requires or forbids? The rules laid down as to the injuries of a servant by a fellow servant, the rule of the road (as it is called), the rule as to "*scienter*" relative to damage by ferocious animals, and other like rules, have been started for the most part by a consideration of what was evidence for the Jury. They have now grown into rules of law by which we must guide our conduct towards each other, and they are exactly similar in kind to the rules for preventing collisions at sea, which are the result of direct sovereign legislation. This view of the proceeding, therefore, leads to the creation or restriction of duties and obligations by Judges, in other words, to the enunciation of law.

Avowedly, as we are all aware, Judges never do either of these things. Avowedly they never sit in appeal from the verdict of a Jury; nor do they enunciate new rules of law. I think, however, looking, not at individual cases, but at the general results of the action of the Courts after verdict, that it is impossible to say that Judges, when inquiring whether there was evidence for the Jury, do not to a certain degree really do the first, whilst it is perfectly certain that, to a very large extent, and very frequently, they do the second. But here again it is not any disturbance of functions to which I wish to draw attention. That is of no importance now. I wish, as before, to point

out in what condition the question for decision is very often left. Taking cases singly, it will be very often extremely hard to say whether the Judges are weighing the facts or enunciating the law. The process is so uncertain and obscure as to make it very often impossible for any one to say positively which is being done. Ultimately, from a series of similar cases a clear rule of law may emerge, like the rule of the road, or the rule as to the negligence of fellow servants. Or, as in the case of an invitation by the servants of a railway company to passengers to alight, by calling out the name of the station, the Judges, after having almost made a rule of law, may let it drop down again to mere fact. In the meantime, before any rule is fixed, and whilst a great number of possible rules are being suggested, no man can say whether the question is one of law or fact, and the dubious region is again arrived at. Nor is this condition merely a transitory one. Some questions settle themselves down in time to law or fact, but some questions never cease to hover between the two.

The list of questions which are neither assignable to law nor fact is far from being exhausted by the above examples. Besides questions of intention, of custom, of notice, and of negligence, there are very many others in which we should find the same ultimate difficulty of classification. Has a man been guilty of "laches" or fraud? Has he lost the right to prosecute his claim by delay? Was a bargain unconscionable? Did the damages claimed naturally result from the wrong complained of? Is a contract against public policy? And besides these, the countless cases in which the question is asked, was what was done reasonable? These are all ultimate forms of questions upon which the sovereign authority has made rights, duties, and obligations to depend: and as to all of them, we should find the same uncertainty of treatment, rendering it impossible to say whether the tribunals which are called upon to decide them deal with them as questions of law or questions of fact.

I am purposely discussing the distinction between fact and law from a purely English point of view, but it may be as well to remember that this distinction was very familiar to the Roman lawyers, as it necessarily must have been under a procedure which involves, theoretically, a separation of fact and law even sharper and more precise than our own. And those discerning men had not failed to perceive the difficulty of assigning certain questions to either one or the other branch of the classification. Speaking of *mora*, Paulus says: "*Nam difficilis est hujus rei definitio. Divus quoque Pius Tullio Balbo rescripsit; an mora facta intelligatur, neque constitutione ulla, neque juris auctorum quaestione decidi posse, cum sit magis facti quam juris.*" (Dig. 22.1.32.)

There being then so many questions which cannot be classed under either branch of a division usually supposed to be exhaustive, one is naturally led to inquire, whether these questions do not themselves present some common feature which would enable us to reform this division, and by adding a third class, to render the classification somewhat more complete. I cannot say that I have succeeded in quite satisfying myself how this further classification can be accurately made. But I may point out for consideration, that all the questions which cannot be assigned either to law or to fact do seem to me to present one common peculiarity, which is inherent in them, that is to say, a peculiarity which exists in them quite independently of the treatment which they have received; as if, therefore, there were something in their very nature which essentially distinguishes them from ordinary questions of law or fact. That peculiarity is this:—In all of them, or almost all of them, we find if we analyse them closely, that, however strong the general impression may be to the contrary, after the facts properly so-called have been ascertained with precision, there does remain still something to be done before the law can be applied. When, for example, the

law requires that conduct should be honest, prudent, skilful, or diligent, and makes duties and obligations depend on its being so or not being so, before the law can be applied, not only the facts must be ascertained, but the conduct of the party must be judged and estimated. Does his conduct in point of honesty, prudence, skill or diligence come up to the required standard? And what is that standard? As far as I am aware, it is in the breast of the person or persons giving the decision; for there is no external known and fixed standard by which conduct can be measured or tested. Questions which thus depend upon estimation of conduct do seem to be by their very nature a class altogether distinct both from questions of law and questions of fact, at least as those terms are defined above. The same thing occurs, though not quite so obviously, with questions of intention. Ultimately we never determine, and never can determine with certainty, what was the state of mind of the person whose acts are under consideration. We can never know what consequences he expected to result from the transaction. We can only judge what consequences a reasonable man would, under the circumstances, expect; and this can only be determined by our experience of the world. So with questions of custom, of damage, and of notice; with questions whether conduct was reasonable or honest, and so forth. After having ascertained the facts, some one, be it judge or juryman, before the law is applied must apply his experience—must say what, under the circumstances, was natural, reasonable, or proper. And it would therefore seem to be true that the questions to be determined by legal tribunals, instead of being divided into questions of law and questions of fact, ought really to be divided into questions of law, questions of fact, and questions of experience—I use the word “experience” in preference to “conduct” because it points to the faculty which the consideration of such questions calls into play.

It may be remarked, and it is true, that all questions of

fact ultimately present themselves as questions of experience, when there is any dispute about them. It is by the light of experience that we determine between conflicting statements and presumptions where the truth lies. But just as language in common use permits questions of law to be classed apart from questions of fact, and excludes from the term "questions of fact" certain questions of fact of a particular kind, so we may, I think, conveniently be allowed to class apart the questions of experience to which I have alluded above. But, if necessary, the division may be strictly stated thus:—

1. Questions of Law.
2. Questions as to the existence of any Fact, except law, capable of being perceived by the senses. (Every thing else which Sir James Stephen calls fact will come under class 3.)
3. Questions of Experience not coming under classes 1 and 2.

But for ordinary use the brief expressions, questions of Law, questions of Fact, and questions of Experience, would suffice.

It is worth while next to inquire what effect the recognition of this third class of questions might be likely to have upon the administration of justice. How would questions of experience be practically dealt with, if their existence were acknowledged as a distinct class? In the first place, in the cases where trials are held before Judge and Jury, would the Jury be still the persons whose primary duty it was to estimate conduct by comparing it with their own experience? I think so. Matters of this kind which usually come before Courts of Common Law are the uses to which property may be put, the relations between husband and wife, parent and child, employers and employed, our dealings towards each other when accident, or business, or the intercourse of daily life brings us into

contact, and so forth ; and I think the spirit of our institutions requires that these matters should, at any rate, be submitted to a jury. The sovereign authority having expressed our duties for the most part in the very general form above indicated, I think the current standard for the estimation of conduct cannot be placed *exclusively* in the breasts of a body of lawyers. If the sovereign authority were now to commence more accurately to define the duties which it has imposed, our political machinery would give the public voice a larger share in the definition of these duties ; and I do not think we should be satisfied if, under any circumstances, the public voice, which now operates through the Jury, were shut out.

I must here also again remind the reader that the effect of removing questions of experience entirely from the Jury and placing the final decision of them in the hands of the Judge, is not to be measured by the mere difference between the sentiments which prevail in the minds of judges and of jurymen as to the conduct required in the relations of life coming under notice. The difference between the sentiments of a single well defined class and of a shifting body into which nearly all classes enter at one time or other is an important one, no doubt, but there is one more important still. Juries are a discontinuous, whilst Judges are a continuous tribunal. What exact opinion as to the conduct of the parties has been formed by the Jury is very rarely known with precision, since they give no reasons for their verdict, and we can very often only guess at the steps by which they have arrived at it. Nor is it very important to inquire, for it is certain that the same jury will never sit again. Consequently a verdict is forgotten very soon after it is delivered, and no one ever thinks of referring to it even as a guide, still less as an authority, in future disputes between other parties. But not so with the decision of a Judge. When he expresses his opinion he almost always gives his reasons for it, and

his reasons are all carefully recorded. Nor, according to our existing traditions, can any Judge in any future case disregard either the opinion, or the reasons which support it. Were the Judges made completely masters of questions of experience, it is highly probable, unless our forms and traditions were modified, that strict rules of law, imposing sharply defined duties, would grow up much more frequently and more rapidly than they do now: and also that the rules so arrived at would in some matters be in advance of, in others lag behind, the current opinions of the age. One of the peculiar advantages of the Jury system is that it tends constantly to maintain an equilibrium between law and public opinion.

On the other hand, would it be safe to leave to the Jury the *final* decision of questions of experience? In criminal cases we already do so, but the Jury in criminal cases are, practically, to a considerable extent under the control of the Judge who presides at the trial; and, as a jury is also generally lenient—and leniency in criminal matters seldom does harm—no inconvenience has been found to result. But civil matters are different. The negative result of a verdict of “Not Guilty” in a criminal trial is here not possible. A verdict *against* the Plaintiff is a verdict *for* the Defendant. Civil cases also require much nicer consideration and more carefully devised safeguards than criminal ones. The Plaintiff, in a very large number of civil cases, comes before the Jury having suffered a real misfortune, and the Jury are apt, instead of weighing carefully the Defendant’s conduct, to ride off upon some other considerations. They are apt to consider who can best afford to lose, the Plaintiff by his misfortune, or the Defendant by the verdict going against him; or they act upon some prejudice, either against the class to which one or other of the parties belongs, or against the individual on account of his conduct on some other occasion. The excitement, too, of a trial is often very great, and it is quite as well that

so delicate a question as the estimation of conduct by the light of experience should be reconsidered in a calmer atmosphere than a Court of *Nisi Prius*.

The objection, as it strikes me, to our present system lies not, in principle, to Judges reviewing the decision of the Jury upon questions of experience, but to the roundabout and cramped mode in which Judges often arrive at the task which they are called upon to perform. Shut up, as Common Law judges theoretically are, within the region of strict law, they are obliged, in order to bring these questions within their cognisance at all, either to do violence to language by calling them questions of law, or to enter upon the vague and ambiguous inquiry whether there was any evidence for the Jury, and to pretend that that also is a question of law. It would certainly be advantageous if we could get rid of this tortuous procedure. For instance, it would be better if it were fully understood that in ordinary cases of negligence there was a question neither of fact nor of law—a question to be submitted to the Jury, but in which the opinion of the Jury was not final—a question as to which the verdict of the Jury might be reconsidered *in banco*. The case actually coming up for decision *in banco* would thus be simplified, and embarrassment would be avoided in dealing with other cases. Our Law Reports are filled with cases upon negligence. I do not say these ought not to be published. These decisions may serve as a check upon caprice, and, upon some topics, as a nursery for new rules of law of a useful kind. But it is, I think, clear that Judges ought to be allowed to deal with prior decisions upon such a subject as negligence with far greater freedom than they possess at present, and to treat these decisions as furnishing only a guide and not a binding authority. The long arguments and ingenious devices to which Judges have to resort in order to distinguish prior decisions the authority of which they wish to elude, greatly disfigure their judgments, and

the sound sense which generally lies at the bottom of those judgments is very often completely lost in the cloud of casuistry by which it is surrounded.

Where the Judge decides the whole case without a jury, these roundabout proceedings are indeed avoided, and he has generally no difficulty in placing before himself in a simple form the question to be determined. But here, also, I think it would be advantageous if, in the matter of authority, a distinction were made between prior decisions upon law and prior decisions upon questions dependent on experience, and if the binding authority of the former were distinguished from the guiding authority of the latter. I do not think this separation would impede the growth of useful rules of law, whilst it would confer upon Judges an advantageous degree of freedom in the exercise of their judgment. Surely if experience is to be appealed to, it is the experience of our own times which is chiefly to guide our judgment, and not that of a hundred or two hundred years ago.

The next point to which I wish to advert, and which is by far the most difficult one, is this: Does this triple division into questions of law, questions of fact, and questions of experience, in any way affect the conception of law itself? Upon this point I can only at present venture to observe that Austin appears to me to have overlooked entirely the existence of any such intermediate questions as I have here indicated, as well as the fact above adverted to, that primary obligations are, to a great extent, only expressed by requiring conformity to what he would call a moral standard, or some other standard equally indeterminate. Austin would almost seem to deny that the *arbitrium boni viri*, or, as French lawyers call it, *le bon sens et l'équité*, can determine a legal duty. If Austin really means, as he seems to imply, that there is in such a case no law at all—(see 3rd Edition, p. 687)—the world is in a strange

position. But I do not think that if it had occurred to Austin to consider this condition of things, he would have said that a command by the Sovereign authority to act in accordance with what a *vir bonus* would consider honest, prudent, skilful, or the like, this command being enforced by a sanction, was not a law. I have not discovered anything in his analysis of law which would compel him to say so, though it is clear that in the passage to which I refer, he for the moment thought so. It also seems to me certain that if this condition of the law had occurred to Austin, he must have modified some of his criticisms upon the definition of jurisprudence given in the Digest (p. 224). From these criticisms, as from the passage above referred to, it seems that Austin considered it necessary, in order that there should be any law at all, to keep out morality and any other equally uncertain test of conduct altogether. So long as the sovereign authority requires a man to perform, or to abstain from, a particular class of acts—as, for example, to have his children vaccinated, or not to enter upon his neighbour's close without his permission—this rigid exclusion may be made. But when a man is ordered, as he constantly is, to be honest and diligent, or to abstain from fraud or negligence, how can Austin's assertion be supported that "law is itself the standard of justice"? The sovereign authority has set up another standard—the standard of experience—or, if you like to call it so in the particular class of cases with which Austin is dealing—the standard of morality. Nor can Austin's observations be explained away by saying that in these cases the moral standard becomes the legal one. Austin evidently thought that the moral standard could not be made the test of a legal duty. He seems to consider it a "strange obliquity" of Lord Mansfield that he should have declared a moral consideration sufficient to support an express promise, and for the following reasons: "Moral obligation," he observes, "is an obligation imposed by

opinion, or an obligation imposed by God : that is, moral obligation is anything that we choose to call so, for the precepts of positive morality are infinitely varying, and the will of God, whether indicated by utility, or by a moral sense, is equally matter of dispute. This decision of Lord Mansfield, which assumes that the Judge is to enforce morality, enables the Judge to enforce just whatever he pleases." Possibly the doctrine here combated may be open to objection, still Austin's objections to it are too broadly stated. Judges do every day enforce obligations not a whit less vague than this ; and, whether this doctrine (for which Lord Mansfield is here made responsible, but which is really due to Sir James Mackintosh) be correct or not, it cannot be reasonably objected to it that the obligation is only ascertainable by reference to a moral standard. If obligations so ascertained are, for the reasons given by Austin, not legal obligations at all, does it not follow that chapter after chapter of what is usually considered law must be struck out entirely? We must exclude a large part of the Law of Contract, much of the Law of Ownership, nearly half of what we specially call Equity, and nearly the whole Law of Torts in every country in Europe.

I have only one word more to add. I have spoken of Judges transgressing the boundaries of their functions, and have, unavoidably, used other expressions which might seem to indicate an intention to criticise adversely the administration of justice in our Courts of Common Law. This is not my intention. I hope no one will imagine that I am attempting to revive the exploded misconceptions of Bentham as to the action of Judges in English Courts of Justice. The mode in which Judges and Jurors co-operate in the administration of justice does equal honour to both. Taken upon the whole, it is a marvellous combination of skill and good sense. I do not even wish to criticise it,

still less materially to disturb it. I only wish to see some parts of its rather intricate machinery work more effectually and with a little less friction.

W. MARKBY.

Calcutta.

III.—THE LATE RIGHT HON. JAMES WHITESIDE, LORD CHIEF JUSTICE OF THE QUEEN'S BENCH, IRELAND.

THE career of this distinguished Irishman affords a fine example of a man rising to the highest position by the irrepressible force of genius and character. Like nearly all eminent Irish Lawyers he became a member of the House of Commons, and brought to that Assembly an amount of oratorical talent which placed him in the front rank of debaters. For the long period of nearly forty years, Mr. Whiteside held a prominent position in public estimation at the Bar, in the Senate, and on the Bench; and the distinctions he attained in these several stations, and the triumphs he achieved, fully entitle him to be regarded among the most able advocates, renowned senators, and constitutional judges of the present century.

James Whiteside was born in the glebe-house of Delgany, in the Co. Wicklow, on the 13th August, 1806. His father, the Rev. William Whiteside, was Rector of that picturesque parish, and was highly respected for his amiable disposition, devotion to his sacred calling, and varied literary attainments. He died before either of his sons had seen many

years, and left them to the guardianship of the Rev. James Whitelaw, Rector of St. Catherine's Parish in Dublin, and a distinguished writer, author, in conjunction with the Rev. Edmund Walsh, of the History of the City of Dublin.

James Whiteside became a student of Trinity College, Dublin, about the year 1827, and took several premiums in classics. As was natural to one of his fervid temperament, the great masters of Oratory in Greece and Rome—Demosthenes and Cicero, of whose works he afterwards made good use—were his favourite Authors. He determined to study for the Bar before he took his degrees in the University, and for this purpose went to London in 1828, where his unflagging energy, untiring industry, and steady application to legal studies, made him, even at that time, a remarkable man. He attended the Law Class of the London University, then directed by Professor Andrew Amos, whose edition of Phillips's Treatise on Evidence added to his reputation as a professed Jurist. At the Debating Society of the University Mr. Whiteside was a constant speaker, and his brilliant displays gave promise of future renown. His style of speaking was very Demosthenic, marked, we are told, "by intense enthusiasm, earnestness, and vehemence, and whilst the burning words rushed forth with the irresistible strength of a deep and impetuous river, his action, which nature and passion dictated, was far more appropriate and impressive than mere art could ever teach. Yet, in 'the very torrent, tempest, and whirlwind of his passion,' there was a grace and moderation of sentiment, and a chasteness of language and expression, which never made 'the judicious grieve,' because he never overstepped the modesty of nature. His speeches often produced a mixture of fear, awe, and indignation, or, if he touched the chords of ridicule, the audience was 'in a roar.'"

While thus pouring forth his stores of oratory at night, the hard working student was up betimes in the morning. He followed the sage advice of Littleton, and made himself

thoroughly familiar with the forms and rules of pleading, working in the chambers of Mr. Thomas Chitty, often for ten hours a-day. He analysed the Reports of Lord Coke, transcribed leading cases, and found, or made, time to contribute to periodical literature those charming biographical papers—lately collected and published by his friend, Mr. William Dwyer Ferguson, under the title of “Early Sketches.”

Mr. Whiteside graduated in the Dublin University, taking his Degrees as Bachelor and Master of Arts in November, 1832.* His collegiate career would, no doubt, have been more brilliant had he not devoted so considerable a share of his time to his legal studies. It is a tradition of old Trinity that he twice competed for a scholarship, but was not successful. Before taking his University Degrees he was called to the Irish Bar, in 1830.

Shortly after being admitted to practice at the Bar, Mr. Whiteside joined the North-East Circuit, and as Counsel for the late Sir James Emerson Tennent, in Belfast, had an opportunity of showing his capacity for business. Luckily, he was quite equal to the occasion, and made a great display of high forensic abilities. Further, his speeches in defence of Samuel Gray, of Ballybay, who was tried for manslaughter at Monaghan; for Hughes, at Armagh; and on the prosecution of the satirical Dublin newspaper, called the *Comet*, for a libel upon one of the Directors of the Apothecaries' Hall, afforded him the fullest scope for his brilliant oratory, legal learning, and ready wit. It was Mr. Whiteside who raised the question as to the validity of marriages between members of the Church of England and of the Presbyterian Church, on the trial of Mills, who was charged with bigamy. The case was argued in the Court of Queen's Bench, Ireland, and then in the House of Lords, where Lord Lyndhurst paid the eloquent Irish Advocate the most

* Dub. Univ. Cal. 606. He obtained the Degrees of LL.B. and LL.D. *Hiem.* 1859.

marked compliment of saying, "Nothing could be added to his argument."

We could give many passages from his speeches on Circuit to show his peculiar style, but the limited space at our command restricts us to the following, taken from his address to the Jury at the Assizes at Armagh, during the summer of 1842, where he defended men indicted as Ribbonmen, tried before Judge Crampton :—

"To a despotic and unwise Government alone is the unenviable honour to be awarded of employing a horde of depraved, demoralised, unscrupulous spies, who, in the garb of friendship and confidence, steal on their unsuspecting victims; and when they have made them criminal with themselves—but not so deep-dyed in guilt and unfathomed villany—hand them over to the authorities, who, in the plenitude of their power, wreak on their devoted heads the full measure of their vengeance! No, I say, it is not the duty of any Government to employ means such as this for conviction. * * * His (Hagan's) character is that of a spy—an informer—an appellation the most odious, the most detestable that could fall on the ear, the very recollection of which brings us back to the darkest period of our eventful history! It is well to respect the officers of the law; but if there is any one mode of bringing the authorities into disrepute it is that against which I have remonstrated.

"Judge Crampton : In commenting on that person's (Hagan's) evidence, the counsel who has conducted the case for the defence had preferred a charge—had made an accusation—which could not be viewed in any other light than one that was of a most serious character, and most disreputable to the Government. He admitted it might have been done unintentionally in the zeal of the learned counsel for his client. Judge Crampton was sure that the learned counsel would now retract any insinuations which were calculated to convey charges against a Government the most serious and discreditable.

"Mr. Whiteside (vehemently) : No, my lord; on the contrary, so far from retracting these accusations, I re-assert them."

The practice of this fervent and able barrister had, by this time, grown so large that the Lord Chancellor of Ireland, Sir Edward Sugden, considered him a worthy recipient for the silk gown of Queen's Counsel, and he was called to the Inner Bar in 1842.

The political events which shortly afterwards occurred in Ireland called forth the powerful efforts of the orator and advocate. Well has the great American lawyer and gifted speaker, Daniel Webster, described such combinations. "True oratory," he says, "does not consist in mere words, it must exist in the man, in the subject, and in the occasion. Labour and learning may toil after it, but they toil in vain; the subtlest disquisitions of the schools may aspire after it, but they cannot reach it. It comes, if it comes at all, like the outpouring of a fountain from the earth, or the bursting forth of volcanic fires, with spontaneous, original, nature-force. Then patriotism is eloquent, then self-devotion is eloquent; speaking with the tongue, flashing from the eye, animating the whole spirit onward, right onward, to its object. This! this is eloquence! or rather it is something more than eloquence, it is action, noble, sublime, God-like action."

Any of our readers who were present in the Irish Court of Queen's Bench during the O'Connell State Trials of 1844, will readily remember how admirably the words just quoted describe the magnificent speech which Mr. Whiteside made upon that occasion. The indictment charged O'Connell, and the most prominent members of the Repeal Association, with Conspiracy to alter the Laws and Constitution of the Realm by overawing the Government, and the trial lasted for a very considerable time. The array of Counsel for the defence comprised the *élite* of the Bar of Ireland, Richard Lalor Shiel, Q.C., Jonathan Henn, Q.C., Whiteside, Q.C., Fitzgibbon, Q.C., McDonagh, Q.C. Each spoke according to his special gifts, some on the Law of the case, others on the facts as applicable to the Law, but everyone expected a brilliant outburst from Whiteside. Accordingly, on the day he was expected to address the Jury, a crowded Court attested the eagerness to hear him. Well was the anticipation fulfilled; the famed masterpieces of antiquity alone can stand in rivalry.

Modern eloquence pales before it ; even Grattan's famous speeches hardly approach it in fervour, while the ingenuity with which Mr. Whiteside introduced such topics as might be supposed to touch Irish hearts, and win the sympathy of the Jury to the accused, show the nicest skill. It is too long to quote or we should gladly enrich our memoir with this inimitable sample of the orator and the lawyer, but we cannot pass on without enabling the reader to judge of its power, by the peroration of the first day's advocacy. It should be remembered that O'Connell was seeking the Repeal of the Union :—

“Of self-legislation the Irish are deprived; for self-government, it would seem, they are incompetent. It is a matter no less of surprise than of concern that the country which produced a Burke, the teacher of statesmen, the saviour of States, cannot now furnish a single individual qualified to share in the administration of his native country. He is but a poor statesman who thinks the pride of a sensitive people can be wounded with impunity. You may say, Gentlemen, and say with truth, that it is a matter of small moment who the individuals may be who compose the Ministry of the day, provided the people of Ireland are prosperous, contented, and happy? Alas! a large portion of our countrymen are unhappy, discontented, destitute, pressed down by poverty. They look around for the cause of these misfortunes; they behold a country blessed by Providence with the means of wealth; the strong man pines for the daily wages of a sixpence—he strives with gaunt Famine in the midst of fields teeming with fertility and plenty. Is he seditious if he exclaims, in the language of indignant remonstrance, that he thinks a native Parliament would give him the means of subsistence? Is it criminal in him to wish for the means of life? Is he seditious if, knowing that his single voice would be unheeded as the idle wind, he joins with other men, wretched as himself, in a declaration of their common wants, their common grievances, and their common sufferings? Is he, or are they, conspirators, if he thinks a local Parliament might, perhaps, give them these blessings for which they sigh? They think, perhaps erroneously, that a resident aristocracy and a resident gentry would prove the source of industry and the means of wealth; they conclude, rashly perhaps, that it is not morally

right millions should be drained annually from the soil of Ireland by those whose tastes are too fastidious to permit them to spend one hour among the people who labour to supply their extravagance or their necessities; they say by the evidence of their senses they know the value of a resident peerage and gentry by the happy results which flow from such residence wherever it exists; they see their aristocracy absentees—the mischief daily and hourly increasing; they think, perchance, a native Parliament would induce them to return: therefore, of the Union they demand a Repeal. Are they conspirators because they do so? They know, and true it is, that the beauties of Ireland, if now she has any, are not sufficient to induce her nobility or her gentry to reside. What are her rare beauties compared with the fascinations of the Imperial Senate, or the glittering splendour of a Court? Patriotism is a homely virtue, and can scarce thrive by absence, by an education, by a residence, by tastes, by feelings, by associations which teach Irishmen a dislike, not unmingled with disdain, for their native country. They see and believe that wealth is hourly diminishing in the country; before them they think there is a gloomy prospect and little hope. They look to their stately metropolis; they see what a quick and sensitive people cannot shut their eyes to—the houses of their nobility converted into boarding-schools or barracks, their Stamp Office abolished, their Linen Hall waste, their Exchange silent, their University deserted, their Custom House almost a poor-house, and, not long since they read a debate, got up by the Economists, as to the prudence of removing the broken-down Irish pensioners from Kilmainham to Chelsea, to effect a little saving,—careless of the feelings, the associations, the joys or the sorrows of the poor old Irish soldiers who had bravely served their country. That cruelty was prevented by the exhibition of something like national spirit and national indignation. They see the expenditure of every shilling withdrawn from the poorer to the richer country, on the ground of the application of the hard rules of political economy, or the unbending principles of Imperial centralization. They behold the Senate House of Ireland—the Union has *improved* it into a bank. That magnificent structure within whose walls the voice of eloquence was heard, stands a monument of past greatness and present degradation. The glorious labours of our gifted countrymen within those walls are not forgotten; the works of the understanding do not quickly perish. The verses of Homer have lived for

twenty-five hundred years and more without the loss of a syllable or letter, while cities, and temples, and palaces have fallen. The eloquence of Greece tells of the genius of her sons and the freedom it produced, and we forget her ruin in the recollection of her greatness ; nor can we read, even now, without emotion, the exalted sentiments of her inspired sons, poured forth in exquisite language to save the expiring liberties of their country. Perhaps their genius had a resurrectionary power, and in later days quickened a degenerate posterity from the lethargy of slavery to the activity of freedom. We too, in better times, have had amongst us men who approached the greatness of antiquity ; the imperishable records of their eloquence may keep alive in our hearts a zeal for freedom, and a love of country. The comprehensive genius of Flood, the more than mortal energy of Grattan, the splendour of Bushe, the wisdom of Saurin, the learning of Ball, the noble simplicity of Burrowes, the Demosthenic fire of Plunket, and the eloquence of Curran rushing from the heart, which will sound in the ears of his countrymen for ever. They failed to save the ancient constitution of Ireland ; wit, learning, eloquence, genius lost their power over the souls of men. With a great exception,* these our distinguished countrymen have passed away, but their memorials cannot perish with them ; while the language lasts their eloquence lives, and their names will be remembered by a grateful posterity, while genius is honoured or patriotism revered. Lastly, on the subject of the Union, the people say, *The Imperial Parliament has not attended to their peculiar wants, nor redressed their peculiar grievances. Our character, say they, has been misunderstood, and sometimes slandered ; our faults have been magnified into vices, and the crimes of a few have been visited on the Nation.* The Irish, the mere Irish, have been derided as creatures of impulse, without settled understandings, or reasoning power, or moral sense. They have their faults, I grieve to say it ; but their faults are redeemed by splendid virtues, their sympathies are warm, their affections are generous, their hearts are brave. They have rushed into this agitation with ardour ; it is their nature, when they feel strongly, to act boldly, to speak passionately. *Ascribe their excesses to enthusiasm, and forgive. Recollect that same enthusiasm has borne them triumphant over fields of peril and glory, impelled them to shed their dearest blood and spend their gallant lives in defence of the liberties of England. The broken chivalry of France*

* Lord Plunket.

attests the value of that fiery enthusiasm, and marks its power. Nor is their high spirit useful only in the storm of battle; in the hours of adversity it cheers their almost broken hearts, lightens their load of misery, well-nigh insupportable, sweetens that bitter cup of poverty which thousands of our countrymen are doomed to drink. What is there truly great which enthusiasm has not won for man? The glorious works of art, the immortal productions of the understanding, the incredible labour of heroes and patriots for the salvation of the liberties of mankind, have been promoted by enthusiasm, and by little else. Cold and dull were our existence here below unless the deep passion of the soul, stirred by enthusiasm, were sometimes summoned into action for great and noble purposes—the overwhelming of vice, wickedness, and tyranny—the securing and spreading the world's virtue, the world's happiness, the world's freedom. The hand of Omnipotence, by whose touch this island started into existence, amidst the waters which surround it, stamped upon its people noble qualities of the intellect and heart. Directed to the wise purposes for which Heaven designed them, they will yet redeem, regenerate, and exalt this country."

The effect of this peroration was electrical. The audience were completely carried away by the rushing torrent of masterly declamation which fell from the impressive advocate, who by this speech leaped far and away as a powerful speaker, before every man at the Irish or any Bar. Shiel's speech dwarfs beside it, pathetic and beautiful as it was, so full of exceeding beauty that as the writer of this memoir reported it, he almost wished he could only listen and drink in its grace and pathos; but the rest of the Counsel—in sporting phrase—were not placed in the running. The object of each was unattained, indeed unattainable with a Jury so arranged. No words however strong, no argument however convincing, could alter the opinions of men determined to convict, and we all know the result. Conviction was a matter of course. Sentence followed upon conviction, and a writ of error was argued in the House of Lords, which quashed the conviction and made the sentence null and void: the Lord Chief Justice of England declaring that a Jury so constituted as this was made trial by Jury in Ireland "a mockery, a delusion; and a snare."

The result of this very remarkable speech upon Mr. Whiteside's practice may be readily surmised. He was inundated with business. Retainers came in shoals, and he had special fees on almost every Circuit. The writer had the good fortune to be on the Munster Circuit when Whiteside came to Cork, and his drollery, his ready wit, his talent for cross-examination, and his address to the Jury, were all inimitable. The spirit, however, overtaxed the flesh, and the busy toiler soon needed rest and repose. He had to leave his briefs, close his books, turn his back on the Four Courts, and seek in the sunny land of Italy for that health which was denied in his own. He remained away for two years, during which he composed a work entitled, "Italy in the Nineteenth Century." It abounds with interesting and amusing descriptions of life and scenery, but as Mr. Whiteside held strong Protestant views, and was bitterly hostile to the creed of Rome, the work, as might be expected, shows his prejudices.

Having resided for about two years in Italy, Mr. Whiteside's health was sufficiently re-established to enable him to return to his profession. The writer was glad to see him energetic as ever, though he looked very thin. The Young Ireland Revolt in 1848 collapsed, and the leaders, Smith O'Brien, Thomas Francis Meagher, and some others were arrested. They were sent for trial by Special Commission, the Judges being the eminent Chief Justice of the Queen's Bench of Ireland, Blackburne, the Lord Chief Justice of the Common Pleas, Doherty, and Judge Moore. The Commission was opened at Clonmel in September, 1848. The prosecutions conducted by the Attorney-General (Monahan), the Solicitor-General (Hatchell), and other Counsel. Mr. Whiteside, Q.C., was for the defence, and his speech on behalf of Mr. Smith O'Brien and T. F. Meagher was singularly able. It was, of course, what is termed an up-hill case; the facts could not be denied; the prisoners' conduct scarcely admitted of

question; and all that could be addressed to the Jury was to try and show that the intention of the prisoners was not to make war, but to make their escape from arrest. Mr. Whiteside, of course, relied on the character of Mr. Smith O'Brien from his infancy, and as he directed attention to his noble house, the virtue of his aged mother, the attachment of his amiable wife, and attached children, he spoke in such pathetic tones that no wonder the strong spirit of the accused bowed, and torrents of tears relieved the agonised heart. They did not fall alone; few heard the address unmoved, and the sobbing of the auditory told how the orator's words touched the hearers' hearts.

We quote a few passages of his address to the Jury for Mr. Smith O'Brien:—

“The boast of British Law is that it abhors the shedding of human blood. Yield to its benign principles—to the generous impulses of your nature—and stand between the prisoner and his grave. Review his life. From his mother's breast he drank in love of country; from a father's patriotic example the passion grew to a dangerous height. He has indulged perhaps in visions, to the peril of his life, that Ireland might be a Nation, and you her guides to wealth and greatness. In his childhood, he heard that the union with England was carried by corruption. He heard it from an Irish Senator, whom money could not purchase—whom title could not bribe—who gave his honest vote, and would freely give his life to save the perishing Constitution of his country. That father recounted to my client what Plunket, Bushe, and Grattan spoke on the last memorable night of our national existence—how he had been persuaded by the gravity of their arguments, transported by their eloquence, and borne away by their patriotic ardour. His youthful imagination, fired by a sense of Ireland's wrongs, dwelt on the days when we had a gentry and a Senate with intense constancy, and the passion grew that *he* might restore a Parliament to the land he loved. His true offence is that he courted for *you* what is England's glory and blessing and pride. Deeply he may have erred in pursuit of this darling object. Will you avenge his misdirected patriotism by a dreadful death? You may do so, and no earthly inducement will tempt me to say, if you pronounce the awful verdict of guilty, that you have not given

the verdict conscience commanded. If his countrymen condemn my client, he will be ready to meet his fate in the faith of a Christian and with the firmness of a man. The last accents on his lips will breathe a prayer for Ireland's happiness—Ireland's Constitutional freedom. * * * Would to God Mr. Smith O'Brien were my only client. The future happiness of an ancient, honourable, and loyal family is here at stake. The Church, the Bar, the Senate, furnish relatives near and dear to this unhappy gentleman, who, though they differ from him in political opinions, have hastened to give to him brotherly consolation this melancholy day. With broken hearts, should you consign the prisoner to the scaffold, they must henceforth struggle on through a cheerless existence, labouring in sorrow for the land they love. A venerable lady, who has dwelt amidst an affectionate tenantry, spending her income where it was raised, diffusing her charities and her blessings around, awaits now, with trembling heart, your verdict. If a verdict consigning her beloved son to death, that heart will quickly beat no more. Alas! more dreadful still, six innocent children will hear from your lips whether they are to be stripped of an inheritance which has descended in this family for ages—whether they are to be driven, fatherless and beggared, upon the world by the rigour of a barbarous and cruel law—whether they are to be restored to peace and joy, or plunged into the uttermost depths of black despair. There is another who clings to hope—may it be blessed in you. Her life's blood would she gladly shed to save the object of her youthful affection. You will not consign her to an untimely grave? In a case of doubt, at the very worst, let a father's pity be awakened—a husband's love be moved. Let Justice be administered, but justice in Mercy. In no pitiful strains do I seek compassion for my client, even in the case of blood. I ask it solemnly, in the spirit of our free Constitution—in accordance with the rooted principles of our Common Law. When the Sovereign seals, by her coronation oath, the great compact between the People and the Crown, she swears to execute, in all her Judgments, Justice in mercy. That same Justice you administer—no rigorous, remorseless, sanguinary code, but Justice in mercy. Where, as here, the crime consists in the intent of the heart, and you can believe the intent not treasonable, or even doubtful, then, by the solemn obligation even of coldest duty, you should yield to mercy. In nothing, though at an immeasurable distance still, do men on earth so nearly approach the attributes of the

Almighty as in the administration of Justice. Divine Justice will be tempered with mercy, or dismal will be our fate. As you hope for mercy from the Great Judge, grant it this day. The fearful issues of life and death are in your hands—do Justice in mercy. The last faint murmur on your quivering lips will be for mercy ere the immortal spirit will take its flight to, I trust, a better and a brighter world."

The case, however, was too plain to admit of doubt, the prisoner was found guilty, and the terrible sentence awaiting one convicted of high treason was pronounced but subsequently changed into exile, and from this Mr. O'Brien was, after some years, released. He died tranquilly in the land of his birth.

We might considerably enlarge this memoir if we extended our references to the achievements of Mr. Whiteside at the Bar. Thus his masterly address to the Jury in the case of the lady claiming to be the Hon. Mrs. Yelverton was universally allowed to be one of the most splendid addresses to a Jury which ever fell from mortal lips, and which we were told he delivered under very adverse circumstances, having sat up all the previous night by the bedside of his beloved wife, then alarmingly ill.* Both at the Bar and in Parliament his manner was very dramatic, while in social life he was joyous and amusing. He possessed a fund of anecdote which he told so as to render him a charming companion. He ever loved the society of youth, and promoted the College Historical Society, and several religious and literary societies in Dublin connected with the Church. At one of these, the Young Men's Christian Association, he delivered his Lectures, since published, on "The Life and Death of the Irish Parliament."

We have now to trace Mr. Whiteside's career on a different stage from that on which he had gained renown hitherto; we have to change the Forum for the Senate,

* Mrs. Whiteside was Miss Napier, of Belfast, sister of The Right Hon. Sir Joseph Napier, Bart., an accomplished and attractive lady.

the Bar for the House of Commons. In 1851, James Whiteside, Q.C., was elected Member for the Borough of Enniskillen. The representative of a Protestant Constituency, Mr. Whiteside was not long in showing he was well qualified to represent extreme opinions and Ascendancy feelings. The Ecclesiastical Titles Bill was before Parliament, and on the 15th of May, 1851, Mr. Whiteside made a violent speech in support of its provisions:—

“The question was one,” he said, “in which the constituency he represented, and the Protestant inhabitants generally of the flourishing province to which he belonged, took a deep interest. He regretted having to refer to Irish politics or Irish history. There was little in either to invite or to reward inquiry, and he wished, in Lord Coke’s words, darkness might hide and oblivion bury it. He attacked Cardinal Wiseman for his Letter Apostolic, and Archbishop Cullen for the Synod of Thurles; and while they had the one in England, and the other in Ireland, it was vain to hope that religious peace would be preserved in either country. He blamed all who took part in the opening of the Synod; and while he praised the Viceroy, the Earl of Clarendon, for a severe commentary upon the protest issued by the Roman Catholic Prelates against the Queen’s Colleges, he condemned the Lord-Lieutenant for acknowledging an Address signed by John, Archbishop of Tuam, and John, Bishop of Clonfert.*

When questions relating to Law Reform in Ireland came before the House, Mr. Whiteside usually took part in the discussion, and where political feelings did not warp his views, he spoke admirably. On the 8th of July, 1851, the Civil Bill Courts of Ireland Bill was before the House, and he referred to the principle upon which the new County Courts in England had been established—that of uniformity; but the Local Courts in Ireland had been called schools of perjury. He wished all the Local Courts in Ireland were abolished, and the Law in both countries assimilated. He also wished the Judges in the proposed Courts should be selected for their own merits, irrespective

* Hansard, P.D., vol. cxvi., Appendix.

of political or family influences, and thereby secure the due administration of the Law by placing it in the hands of learned and properly qualified persons.* Also, when, on the 23rd of July, in the same year, the Criminal Law Improvement Bill was brought forward, he supported it as one required by the state of the law, by the opinion of the public, and the spirit of the age. What, he said, must the House think of an English Judge deliberately telling a Jury that when a person was charged with stealing a *duck*, and it turned out to be a *drake*, the offender was to be acquitted; or, that a man charged with stealing a *pair* of stockings was to be acquitted because the stockings proved to be *odd* ones? He supported the Bill because it struck at the root of abuses which had long disgraced the administration of justice.

When Sir William Somerville brought forward a Bill to amend the Reform Bill by extending the franchise in Ireland, Mr. Whiteside resisted it on the ground that it would transfer political power to those who were disqualified from exercising it.†

When the Earl of Derby became Prime Minister in 1852, the Earl of Eglinton, of tournament renown, became Lord-Lieutenant of Ireland, with F. Blackburne as Lord Chancellor, the Right Hon. Joseph Napier as Attorney, and Mr. Whiteside, brother-in-law of Mr. Napier, as Solicitor-General. He was re-elected for Enniskillen, and continued to give a large share of his time and attention to Parliamentary duties. The volumes of Hansard bear frequent testimony to his diligence and ability. On the 19th of November, 1852, he brought in a Bill to amend the Procedure in the Courts of Common Law in Ireland. In the course of a very admirable speech, in which he showed the evils which existed, and the remedies he proposed, he mentioned his desire to abolish all distinctions as to forms of action. There were eight or nine different forms of action,

* Hansard, P.D., vol. cxviii., p. 343. *Id.*, p. 1373. † Hansard, P.D., cxix., p. 521.

the value of retaining which, he said, would be discovered from the recollection of the great case of the squib. A party at a fair fired off a squib, it fell on some gingerbread; another party, near at hand, took it up and threw it at a third; it struck him in the eye, and he lost his sight. He brought his action of trespass against the party who fired the squib. The Jury gave him a verdict for damages, but a great question arose on the form of action, whether it was trespass *vi et armis*, or trespass on the case. This was an English case; he would give an Irish one of the same nature. A priest was travelling outside a stage-coach; a race took place between that and a rival coach, and the horses ran away. The priest was alarmed; he threw himself off the coach, and broke his leg. He brought his action for the injury, but the pleader, unluckily, called it by a wrong name—he called it trespass. It was argued that it was a work of necessity, that the priest threw himself off to save his life. On the other hand it was said, he had not been struck, that the act was his own; and he lost not only his leg, but his damages also.* Leave was granted, and Mr. Hume heartily thanked the Solicitor-General for Ireland for introducing this important measure.

In December, 1852, the Derby Government resigned, and Mr. Whiteside ceased to be Solicitor-General for Ireland. He was, however, Member for Enniskillen, and during the Session of 1853, supported strongly the Church of which he was a member. On the debate on Maynooth, on the 2nd of March, 1852, he tried hard to prove that the Jesuits were the ruling body of Maynooth College.† On the discussion of the Sheriffs Courts of Scotland Bill, reference being made to the necessity of Irish Assistant-Barristers residing within their counties, Mr. Whiteside said that the regulation requiring their residence in Dublin, where many of them had large practice, led to this result, that residing in Dublin, and being frequently changed from county to

* Hansard P.D., vol. cxxiii., 266.

† Hansard P.D., vol. cxxiv., 910.

county, prevented them making local connections or acquiring local prejudices, an advantage which the House could not fail to appreciate.*

One of his best efforts was against the abolition of Kilmainham Hospital, established by charter of Charles II., for old Irish soldiers who had served faithfully.† In 1853 Mr. Whiteside obtained leave to bring in a Bill "to facilitate the Sale, Partition, and Exchange of Land by the Court of Chancery in Ireland, and the recovery of Monies secured by Recognizances in Chancery." In doing so, "he called attention to the Encumbered Estates' Court being presided over by Baron Richards, who was therefore often absent from the Court of Exchequer, prevented from going Circuit, or attending the Central Criminal Court. He trusted such a state of things would not be permanent, or drawn into a precedent, for it was contrary to the Constitution that the Judges of the Realm should have anything to hope or fear from the Government of the day."‡ When Mr. Moore, on the 31st May, 1853, moved for a Select Committee to inquire into the Ecclesiastical Revenues of Ireland, with a view to ascertaining how far they were applicable to the benefit of the Irish people, Mr. Whiteside made a most elaborate defence of the Established Church. He said, "Mr. Moore panted for religious equality, but when they struck down the Protestant bulwark in Ireland, they would transfer these funds to the Roman Catholic Church, in order to extirpate Protestantism from Ireland, and with it the element of its civilization, the element of our power, the element of our prosperity, and the element of our greatness."§

On the 4th April, 1854, Mr. Fagan, M.P. for Cork, moved for leave to bring in a Bill to open the honours, degrees, and emoluments previously monopolised by the University of Dublin to persons of all religious denominations, which was seconded by Mr. Hume. The motion was strongly re-

* Hansard P.D., vol. cxxiv., p. 1300. † *Id.* 1070.

‡ Hansard P.D., vol. cxxvi., p. 653. § Hansard P.D., vol. cxxvii., p. 933.

sisted by Mr. Whiteside, as tending to confiscate the property of the University.* When Lord John Russell moved the second reading of the Oaths Bill, on 25th May, 1854, Mr. Whitehead made a most vehement and energetic speech against the measure. He contended that Jews ought not to be allowed the privileges of Christians. If Prime Ministers they might dispose of the bishoprics of the Protestant Church; if Lord Chancellors of the livings; if judges of the Ecclesiastical Courts, they might sit in judgment and decide against Christians. His objection was that according to his reading of the Constitution of this country, Christianity was the law, and the law was Christianity. He could not yield up what he was taught by the wisdom of Fortescue, by the learning of Coke, by the deep thought of Hale.† Mr. Whiteside steadily opposed the introduction of the Ballot, on the ground that the franchise was in the nature of a trust, to be exercised for the use and benefit of the community at large, and should therefore be exercised openly and aboveboard. When the subject of Legislation for Ireland was before the House of Commons, on the 2nd of March, 1855, Mr. Whiteside complained that every Irish Member was kept in a state of doubt, uncertainty, and inextricable confusion with respect to what was to take place, or what the Government intended to do for Ireland.‡ When the Bill to allow a widower to marry his deceased wife's sister was discussed, on the 25th of April, 1855, Mr. Whiteside spoke against the propriety of such a marriage, quoting from the writings of the Rev. R. C. Jenkins and Philo-Judæus, as also a very profound and lucid speech from Lord Campbell, against these marriages. He introduced the details of his Court of Chancery (Ireland) Jurisdiction Bill for second reading on the 3rd of May, 1855, and entered very fully into the state of the Court of Chancery in Ireland, and the various attempts at reform in

* Hansard P.D., p. 498.

† Hansard P.D., vol. cxxxiii., p. 946. ‡ Hansard P.D., vol. cxxxv., p. 15

that Court. The first was in 1819, which by greatly reducing the fees, largely increased the business. Next came the abolition of the Six Clerks. While Lord St. Leonards was Chancellor in Ireland, the warrant or summons system was abolished. He proposed to abolish the Masters' Office altogether, and appoint a Vice-Chancellor in their places, with the same power as the Vice-Chancellor possessed in England. His measure was resisted by the then Solicitor-General for Ireland (J. D. Fitzgerald) in a tone characterised as one of great bitterness and sarcasm. The Attorney-General for Ireland having also disapproved of the measure, Mr. Whiteside said, when replying, "As to the hon. and learned Attorney-General for Ireland he has spoken in a style of eloquence which was peculiar to him. He was not aware that he incurred that attack upon him by meddling with the character of the hon. and learned gentleman; indeed, it was about the last thing he wished to meddle with, and his acquaintance with the hon. and learned gentleman, whether at the Bar or in that House, was so slight he did not know that he had any right to do so."*

On the 28th of April, 1856, Mr. Whiteside made a powerful onslaught on the conduct of the Government during the Crimean War. He moved, "That whilst this House feels it to be its duty to express its admiration for the gallantry of the Turkish soldiery, and of the devotion of British officers at the siege of Kars, it feels it to be equally a duty to express its conviction that the capitulation of that fortress, and the surrender of the army which defended it, thereby endangering the safety of the Asiatic Provinces of Turkey, were in a great measure owing to the want of foresight and energy on the part of Her Majesty's Administration." His speech on this occasion exhibited his peculiar power. It was forcible and eloquent, showing great care in its preparation, and delivered with his usual fervid vehemence. It opened up the whole history of Russian

* Hansard P.D., vol. cxxxviii., p. 88.

policy and Russian aggression. The Attorney-General for England replied in defence of the policy of the Government.*

Mr. Whiteside supported the Appellate Jurisdiction of the House of Lords Bill in a very able speech, which discussed the principles of Appeals, on the 7th of June, 1856; and when the Court of Appeal in Chancery (Ireland) Bill was in Committee, strongly recommended that ex-Chancellor Blackburne, one of the ablest men in Ireland, then in receipt of a pension of £4,000 a-year, should be the first Judge of the Court of Appeal. This was ultimately carried out. He recommended interference by Government in the affairs of Italy during the debate on Lord John Russell's motion for an Address to the Queen on that subject, on the 14th of July, 1856. He supported the expulsion of James Sadleir from the House of Commons in a humorous speech, on the 16th of February, 1857. During the debate, which took place on the 27th of July, 1857, when Mr. Disraeli moved for papers relative to the state of the Bengal Army and copy of a Report on that Army, drawn up by Sir Charles Napier and transmitted to the Duke of Wellington, Mr. Whiteside made a very powerful speech in support of the motion. He went very fully into the affairs of our Eastern Empire, and seemed perfectly conversant with the military operations which had taken place. His speech will throw considerable light upon the conduct pursued towards that vast Empire.† But another opportunity some time afterwards again called forth Mr. Whiteside's oratory in respect to the Indian Empire. On the 12th of February, 1858, Lord Palmerston brought forward his measure for transferring the Government of India from the East India Company to the British Government. He made out a strong case for the proposed change, but it involved questions of such magnitude that it required a thorough examination and the fullest discussion, and, accordingly, all the great intellects of the House were

* Hansard P.D., vol. cxli., p. 1658.

† Hansard P.D., vol. cxlvii., p. 511.

stirred. One of the best debates of modern times ensued. Mr. Whiteside spoke on the second night, on the 15th of February. He disapproved of the proposed change, and appealed to the sense of the House, whether it was a safe thing to pass this Bill. "Remember," he said in concluding, "how infinitely more easy it is, even on the showing of the noble Lord, to destroy than to create. It is a law of the Almighty that while the work of construction is difficult and slow, the work of destruction is easy and rapid. The skill of the architect, the labour of an age, will erect the majestic edifice; a labourer with his pickaxe will speedily destroy its proportions and deface its beauty. This building still stands—it has stood the test of time. Let us strengthen its foundations, enlarge its basis, and improve its structure if we can. But I implore you, while it is yet time, to stay your hands, and do not, upon such arguments as you have heard, overthrow the edifice."*

A change of Government took place in 1858. The late Earl of Derby was Premier, and he appointed the able supporter of his policy, Mr. Whiteside, Attorney-General for Ireland. No more thorough partisan could be found, and all the measures which Lord Derby's administration brought forward in the House of Commons, found in him an intrepid, faithful, and vehement ally. The legal business of his high office was in safe hands. He disposed of the criminal business of the country in a most satisfactory way.

On the 24th of February, 1859, the Right Hon. J. D. Fitzgerald moved that the House be resolved into a Committee to consider the Catholic Emancipation Act, 10 Geo. IV., c. 7., in relation to the Oath thereby required to be taken, instead of the Oaths of Allegiance, Supremacy, and Abjuration. He contended that Roman Catholics had a right to be placed on terms of perfect equality with their fellow-subjects. Mr. Whiteside, the Attorney-General for Ireland, resisted the motion. He said, "This Oath contained

* Hansard P.D., vol. cxlviii., p. 1407

in the Act was accepted by the great leaders of the Roman Catholic party, it was applauded by the Roman Catholic bishops, and had been recognised by the Roman Catholic gentlemen from 1829, a period of thirty years. He trusted it would not be disturbed now by those who wished to preserve religious peace and tranquillity in the country."* Another of the Irish Attorney-General's orations was delivered on the 2nd of March, 1859, when the Representation of the People Bill was discussed.

At the General Election of 1859 the Attorney-General, who hitherto had been constant to Enniskillen, was returned by the University of Dublin, together with Mr. Lefroy.

On the 30th of June, 1859, Mr. Whiteside introduced to the House of Commons the first series of Bills he prepared in order to consolidate and amend the Criminal Statute Law of England and Ireland. In doing so he entered, with considerable details, upon the subject, and contended "that whatever measures concerned the liberties and lives of the people of the United Kingdom must always be of paramount importance in that House." When Sir William Somerville, on the 5th of July, 1859, introduced his Bill to amend the 10th Geo. IV., ch. 7, and sought to allow Roman Catholics to hold the office of Lord Chancellor of Ireland, Mr. Whiteside spoke most energetically against the Bill. He contended that "Catholics should not be Lord Chancellors, as the Irish Chancellors appointed to Protestant livings, and also exercised regal authority, being Lords Justices in the absence from Ireland of the Lord Lieutenants. Also, when questions of doctrine arose the Lord Chancellors of Ireland selected the Judges who were to decide upon these doctrines. Then the Lord Chancellor was an *ex officio* Member of the Ecclesiastical Commission, and thus shared in the control of the property of the Established Church."† In reply, Mr. Gladstone showed "that all the Church patronage

* Hansard P.D., vol. clii., p. 812. † Hansard P.D., vol. cliv., p. 1109.

vested in the Lord Chancellor of Ireland was a vote he shared, in common with five or six others, to two livings in the City of Dublin, and that the exercise of this vote would be provided for by a clause in the Bill; the *ex officio* Membership of the Ecclesiastical Commission did not refer to any official, but only to such as were Members of the United Churches of England and Ireland; and with respect to the Chancellor being a Lord Justice, the Bill provided against a Roman Catholic Chancellor holding such an office." When the subject of Mixed Education in Ireland was brought forward in July, 1859, by Mr. Hennessy, Mr. Whiteside spoke at considerable length upon the subject, and in favour of denominational grants.*

This able and distinguished Irishman was never wanting when the just claims of his countrymen to distinctions or rewards came before Parliament. In March, 1860, Sir Francis Baring argued upon the propriety of giving some substantial reward to Captain McClintock, R.N., and the crew of the ship *Fox*, which discovered the fate of Sir John Franklin. He was ably supported by Mr. Whiteside, in consequence of the interest he had always taken in the fate of Sir John Franklin, and of his personal friendship with the gallant Commander of the *Fox*. Having described briefly the voyage of the *Fox*, Mr. Whiteside said, "The last Arctic Voyage had called forth qualities, and he excepted none of the twenty-five men who formed the crew of the *Fox*, of a higher nature than were displayed on the battle-field. The soldier had a quick death, or a joyful victory; but there was a more enduring spirit, and a loftier resolution, and nobler qualities of mind and body required, successfully to conduct such an enterprise as this, than were required for the field of battle."†

The steam communication between Galway and America, so calculated to foster and promote Irish commercial enter-

* Hansard P.D., vol. clv., p. 291.

† Hansard P.D., vol. clvi., p. 2151. *Id.*, p. 1623.

prise, was ably supported by Mr. Whiteside in the House of Commons. On the 9th of August, 1860, he referred to the great numbers of Irish born, or of Irish descent, who were in the United States, at least 4,000,000. He believed that great trade was sure to flow, and that great advantages, not only to Ireland, but to Scotland, would result from these Transatlantic packets. He argued that if the mail contract then about being discontinued was confirmed, and judiciously acted upon, it would be admitted in after years that a more wise, beneficent, and valuable improvement was never made than the speedy communication proposed between Galway and the opposite coast of the Atlantic.* Unfortunately the company ultimately fell to the ground.

When, on the 14th May, 1861, Sir Hugh Cairns moved for a Select Committee to inquire into the law affecting the contracting and celebrating marriages in Ireland, Mr. Whiteside said "there had never been any genuine law of marriage in Ireland. When they looked to history they found that marriage was always connected with Christianity, and the Saxons, besides the custom of having the priest to bless the union, took the precaution of having part of the ceremony at the Church door. It was Chaucer who wrote

"A woman she was the most discrete alive,
Husbands at Church-doore had she had five."

This was done that the neighbours might see her face, that no pretender should be put forward afterwards, and that she should have dower if she outlived her husband. He referred to the Act passed by the Irish Parliament which rendered a marriage between a Catholic and a Protestant void if the Protestant within a year before the marriage had professed himself to be a Protestant.† During the debate on the third reading of the Church Rates Abolition Bill, on the 19th of June, 1861, Mr. Whiteside delivered a very sarcastic speech. He ridiculed the tone of several of the previous speakers,

* Hansard P.D., vol. clx., p. 1018. † Hansard P.D., vol. clxii., p. 2060.

who, he said, spoke one way and voted another. He quoted, at the conclusion of his speech, from Southey's "Book of the Church," the following extract:—"From the time of the Revolution the Church of England has partaken of the stability and security of the State. We owe to it our moral and intellectual character as a nation, much of our private happiness, much of our public strength. Whatever would weaken it, would in the same degree, injure our common weal; whatever should overthrow it would, in sure and immediate consequence, bring down the goodly fabric of that Constitution whereof it is a constituent and necessary part. If the friends of the Constitution understand this as clearly as its enemies, and act upon it as consistently, and as actively, then will the Church and State be safe, and with them the liberty and prosperity of our country."*

Colonel Dunne brought forward a motion to inquire into the condition of Ireland, on the 12th of June, 1863. Mr. Whiteside made an excellent speech supporting it. He showed the depressed state of the country, the great decline in agricultural produce—in oats, wheat, potatoes, and live stock; the population had materially diminished, and an inquiry into the causes was called for.† The vast range of subjects on which Mr. Whiteside addressed the House can alone be found in the volumes of Hansard. The bombardment of Kagosima, Japan, caused a very important debate in the House of Commons on the 9th of July, 1864, and Mr. Whiteside delivered a very amusing and instructive speech in reply to the English Attorney-General, Sir R. Palmer. When the Right Hon. Thomas O'Hagan, Attorney-General for Ireland, introduced his Court of Chancery (Ireland) Bill, on the 25th of April, 1864, Mr. Whiteside strongly opposed the passing of the measure. Having complained of the conduct of the Attorney-General with respect to hurrying this Bill through Committee, the Attorney-General in reply said, "He had listened to the

* Hansard P.D., vol. clxiii., p. 1322. † Hansard P.D., vol. clxxi., p. 851.

extraordinary performance of the Member for the University of Dublin with very considerable amazement. He had never doubted his hon. and learned friend's powers, but here the hon. and learned member had occupied, he would with all respect say abused, the patience of the Committee for two hours and a half, with a speech which had about as much to do with the motion as the affairs of Kamstchatka or the Great Mogul. Even the authority of the Chairman could not restrain his eloquence; for, although he had given notice of a motion which the Chairman told him he could not move, he had continued to speak upon it for an hour. When the hon. Member for Mallow left the House, in rushed Mr. Whiteside in the fine frenzy that so well became him, and was so usual with him, and made a charge against him. He (Mr. O'Hagan) could only say that he brought in this Bill on his own responsibility. He believed it was for the public interest that it should be carried. If it was not carried it would not be his fault, and he left the responsibility on those who chose to accept it."*

The Opposition having defeated this Bill, and another like Bill having been introduced by the Attorney-General for England, Mr. Whiteside was not long in proposing a Bill on the same subject, and on the 16th of February, 1865, moved that leave be given to bring in a Bill to alter the Constitution, and amend the Practice and course of Procedure in the High Court of Chancery in Ireland. On the 20th of June, 1865, he spoke upon The O'Donoghue's motion upon University Education in Ireland, and contrasted the conduct of some of the former prelates of the Roman Catholic Church in that country, with the strong Ultramontane opinions of those of the present day. He contended there was no need for a Catholic University in Ireland, and seemed to approve of the Queen's Colleges. Mr. Monsell, who replied to him, observed upon the altered tone of the Member for the University of Dublin, who, he

* Hansard P.D., vol. clxxvi., p. 28.

said, "had over and over again argued against mixed education." To this Mr. Whiteside replied, "that was a mistake."

On the 11th of May, 1866, the state of the Irish Bench was brought before Parliament by Mr. Bryan, with special reference to Chief Justice Lefroy, who, he said, was then 92 years of age, having been born in 1774, and called to the Bar in 1797. He referred to the case of a man found guilty of the murder of Lieutenant Clutterbuck, in which a mistake was made by the Chief Justice in charging the Jury. He also alleged that when about to pass sentence of death upon the prisoner his Lordship forgot the words of the sentence; and that even when it was written out for him in a large and plain hand, the nonagenarian Judge was unable to read it, so that the Attorney-General had to stand beside him on the Bench and say the words over to him. He then adverted to the Court of Appeal in Chancery, whereof the Lord Justice (Blackburne) was 84 years old. Sir Hugh Cairns and Mr. Whiteside both spoke against the motion, and Mr. Whiteside having showed that the statement as to what took place on the trial for the murder of Lieutenant Clutterbuck was not accurate, the motion fell to the ground. It turned out very fortunately for Mr. Whiteside that the Lord Chief Justice Lefroy was able to retain his seat on the Bench until the change of Government, then impending, took place. During the month of June, 1866, Mr. Whiteside spoke once on the state of Europe, and again on the resignation of Judge Longfield; but the Parliament, which he had so often addressed with a force and energy seldom surpassed by any other member, was thenceforward to know him no more. On the 5th of July, 1866, Mr. Gladstone, Chancellor of the Exchequer, announced the resignation of Ministers, and tendered, in his own name and that of his colleagues, the expression of their gratitude to those, who with so much zeal and so much perseverance, had supported the Government. Upon the

advent of the Conservative Government to power, the nonagenarian Chief Justice of the Queen's Bench resigned, and the Right Hon. James Whiteside took his place. He soon obtained the reputation of a strictly Constitutional Judge, and though when political or religious questions arose, as in the *O'Keefe v. Cullen* litigation, his strong anti-Catholic views sometimes appeared, he was respected by the Bar, and cordially esteemed by his three Roman Catholic puisne Judges.

We have now sketched, with considerable minuteness, the career of Mr. Whiteside at the Bar and in Parliament, and need not dwell, at any great length, upon his conduct as a Judge. He had in his Court for colleagues, during the ten years he held the chief place, very able and eminent men, Judges O'Brien, Fitzgerald, and Barry; and the Court seldom differed in its decisions, a proof of the competency of the Bench. On Circuit, as during the sittings *in banco*, the Chief Justice was always ready for the dispatch of business, and his manner to the Bar and suitors was kind and considerate.

Towards the spring of the year 1876 the health of the Lord Chief Justice began to show symptoms of decline, and his medical advisers considered rest indispensable. Accordingly he abstained from going the Summer Circuit, and Serjeant Armstrong acted as *locum tenens*. The Chief Justice then tried change of air, and resided for some time at Brighton. But here his life ended on Saturday, the 25th of November, 1876, when he was in his 70th year.

A very unanimous expression of regret attested the public sorrow for the distinguished Irishman. On Monday, the 27th of November, Mr. Justice O'Brien, the Senior Judge of the Court of Queen's Bench, Dublin, in announcing the adjournment of the Court in consequence of the death of the Chief Justice, expressed in graceful terms his own and his colleagues' grief for the loss of their eminent chief, and paid a fitting tribute of respect and regard "to the

memory of one of whose abilities and genius the country might well be proud, and whose loss they, especially, had so much reason to regret."

The remains of Chief Justice Whiteside were laid in Mount Jerome Cemetery, followed by a *cortège* representative of every variety of political and religious opinion, united in this mark of their attachment to his memory.

IV.—CURIOSITIES OF ENGLISH LAW.

NO. I.—RELIEF AGAINST PENALTIES AND FORFEITURES.

IF Sir Samuel Romilly had lived in these days he might perhaps have modified the contemptuous opinion he held of the capacity of Lord Chancellors in the matter of Law Reform. Law Reform has of late been in the ascendant. To have "views" on that subject has now become a necessary constituent element of the complete lawyer. Even those treatises which only profess to impart the rudiments of legal knowledge to the youthful student, endeavour, with a courageous disregard of the mere exigencies of examinations, to instil some notion of the law not only as it is, but as it ought to be. We all dabble in Law Reform, from the Lord Chancellor to the Law Student. Whether even in these days the highest legal dignitaries are the most efficient law reformers is a question that may perhaps admit of doubt, but there can be no doubt whatever that Lords Westbury, Cairns, Hatherley, and Selborne, and above all, Lord Justice James, have displayed much zeal in the cause of Law Reform. There is indeed some

difference of opinion as to whether the latest manifestations of judicial zeal in that direction have been altogether well considered, but no one can deny that the late sweeping enactments betoken a stirring of ideas in high places that to Lord Eldon and the worthies of fifty years ago would have seemed nothing less than portentous. While the Judicature Acts have effected a great revolution in matters of practice, the changes in substantive law have been few and comparatively unimportant. This is a somewhat anomalous state of things. Much remains to be done in the latter department of Law Reform, and the spirit of the time would seem to afford a favourable opportunity for the discussion of certain doctrines which, although established on what was once considered the firm basis of a long line of decisions, have, as we venture to think, very little except their antiquity to recommend them.

There is, perhaps, no part of our judicial system which has been more often made the subject of panegyric than the jurisdiction assumed by Equity to relieve against penalties and forfeitures. If good intentions are the only test of desert, the heroic expedients resorted to by Equity in its endeavours to enforce fair dealing between man and man cannot be too highly praised. These expedients have, however, been attended with untoward results, and we hope to show that the Legislature would act wisely in abrogating the rule of Law, which (among other evils) in many cases hinders a person from enforcing a penalty he has bargained for on the breach of a contract. It is well known that contracts are often enforced by the sanction of a penalty disguised under the name of "liquidated damages," but (as will be shown) it is only a certain class of contracts which is in practice capable of being so enforced, and the Courts might well be constrained to forego the perplexing distinction which at present obtains between penalties and liquidated damages, and to admit the broad principle that contracts may be legally enforced by the sanction of a

penalty on non-performance. It may be observed that the Legislature is in the habit of enforcing obedience to Acts of Parliament through the medium of penalties, and if a person may be called upon to pay a penalty for the commission of an act of the illegality of which he may be ignorant, it is surely no greater hardship, at all events in the absence of special circumstances, that he should be called upon to pay a penalty to which he has purported to subject himself by express contract. The decisions by which the law has been settled, when taken separately, are, it is true, sufficiently plausible, but they are not easily reconcilable. The judicial instinct has contrived, under great difficulties, to preserve a certain semblance of justice, a semblance owing its existence not to steady adherence to the dictates of an inexorable logic, but on the contrary, to the bold disregard of logic which has enabled the Judges to stop short in the middle of any syllogism threatening to lead to an inconvenient conclusion.

There is one familiar and very instructive instance of a decision that would otherwise have worked great injustice, having been rendered innocuous by means of a purely imaginary distinction, namely, the provision for enforcing punctual payment of interest on mortgages. The law on this subject is stated for the edification of Law Students by Mr. Joshua Williams, in his text-book on "Real Property," as follows:—"A curious illustration of the anxiety of the Court of Chancery to prevent any imposition being practised by the mortgagee upon the mortgagor occurs in the following doctrine: that, if money be lent at a given rate of interest, with a stipulation that, on failure of punctual payment, such rate shall be increased, this stipulation is held to be void as too great a hardship on the mortgagor, whereas the very same effect may be effectually accomplished by other words. If the stipulation be that the higher rate shall be paid, but on punctual payment a lower rate of interest shall be accepted, such a stipulation being

for the benefit of the mortgagor is valid, and will be allowed to be enforced."*

It may, we think, be gathered from the above quotation that Mr. Joshua Williams does not regard this distinction with any favour, and probably respect for the Bench would not have deterred him from expressing a decided opinion on the matter had he not felt convinced that any comment would be superfluous.

We now propose to take a comprehensive view of the equitable doctrines of Relief against Penalties and Forfeitures, and in the course of the survey we shall point out some other legal "curiosities" not unworthy of comment.

Perhaps the most astonishing "curiosity" connected with this doctrine is the circumstance that first led to the interference of Equity.

One of the grounds on which Equity professes to exercise its jurisdiction (notably in the case of bonds and mortgages) rests on the assumption, which, if it were not true, would be utterly incredible, that persons are in the habit of putting their hands to documents which do not express their real intention. Equity claims to construe written agreements not according to the plain meaning of the words, but according to what it conceives ought to have been the intention of the parties. The respective parties may have declared their meaning in writing as distinctly as possible, but nevertheless Equity, in the exercise of its discretion, will not only declare that the parties must have meant something quite different, but will carry its declaration into effect by obliging them to act as if they had, in fact, put their hands to such an agreement as it considers they ought to have entered into. This is the Equitable doctrine with regard to mortgages. A mortgage is a document in which an agreement is purported to be entered into between mortgagor and mortgagee which neither of them intends shall be carried into

* Lord Northington, in *Stanhope v. Manners*, 2 Eden, 199, says: "I never heard or could myself discover the sense of this distinction."

effect. In this state of things Equity steps in and says to them, "It is clear neither of you intended to enter into any such agreement as is expressed in this document ; you meant to enter into quite a different agreement, and you shall be held to have executed that agreement instead of the one you did in fact execute." In the case of mortgages the assumption of Equity was no more than the truth. It is notoriously the fact that in every mortgage the parties purport to enter into an agreement different from the one they intend to be bound by, and such being the case, Equity had a good excuse for coming to the rescue. The assumption of a power to override the express provisions of written documents, and of the faculty of arriving at the real intention of contracting parties not by a perusal of their written declarations, but by the exercise of a refined instinct of justice, was, however, fraught with much danger ; and the success of the experiment as to one class of contracts provided a precedent that led to serious difficulty. It is true that the Judges have from time to time, under the pressure of circumstances, given various reasons for relief against penalties ; but according to Lord Macclesfield, "the true ground of relief is from the original intent of the case, where the penalty is designed only to secure money, and the Court gives him all that he expected or desired," and this view of the law, transmitted in Tudor's Leading Cases, continues to be put forward as the pretext for interference, though it has not escaped severe judicial criticism.

The absurdity of the proposition that where a person bargains for a penalty on the non-payment of a stipulated sum at a stipulated time he gets all that he expected or desired, if after an indefinite lapse of time he obtains the sum without the penalty, has been more than once forcibly exposed by Lord Eldon. In *Hill v. Barclay* (18 Ves. 60) he says : "The Court has certainly affected to justify that right which it has assumed to set aside the legal contracts

of men, dispensing with the actual specific performance upon the notion that it places them, as near as can be, in the same situation as if the contract had been with the utmost precision specifically performed; yet the result of experience is that where a man, having contracted to sell his estate, is placed in this situation, *that he cannot know whether he is to receive the price when it ought to be paid*, the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the Court can offer as compensation." Here Lord Eldon puts the matter in its true light; the real reason why indiscriminate relief should not be granted against penalties for the non-payment of money at a stipulated time is that by relieving against the penalty you take away all inducement to punctual payment, so that if the principle enunciated by Lord Macclesfield were to be carried out to its logical conclusion, no one would know when he could get in his debts, and all credit would be destroyed. Just as we hang a murderer, not because he has committed a murder, but in order that murders may not in future be committed, in the same way penalties should be enforced, not in order to wreak vengeance on the defaulter, but in order to deter others from making default.

Although the Chancery Judges did not entertain so great a regard for logic as to feel compelled to make it their business to see that no one was obliged to pay his debts till it should be quite convenient for him to do so, still they carried their benevolence with regard to debtors to such an inconvenient extent in decreeing relief against forfeitures of leases for non-payment of rent at any indefinite time after the rent had become payable, that the Legislature had to interfere and obviate what was acknowledged to be a palpable injustice by putting a limit to the time within which relief might be claimed. The admission that a palpable injustice had been inflicted by following out the proposition laid down by Lord Macclesfield, that a contract to pay a

certain sum on a certain day was sufficiently performed "according to the original intent of the case" by paying the money with interest at any future time, ought in common sense to have resulted in the overthrow of the proposition. As a matter of fact, although "the original intent of the case" may at first have furnished the only pretext for interference, for a long time past this ground of jurisdiction has exercised little, if any, effect on the decisions. It should be borne in mind that Lord Maclesfield, in the leading case of *Peachy v. Duke of Somerset* (1 Stra. 447), expressly limited the right to relief in Equity to those cases "where the penalty is designed only to secure money;" but in course of time this limitation came to be disregarded, and relief was given not only where the penalty was designed to secure money, but also where it was designed to secure the performance of any contract for the non-performance of which pecuniary compensation could be made, the penalty being in Equity regarded merely as a security for the damage really incurred.

The argument for this extension of jurisdiction would seem to run thus: Where a penalty is designed only to secure money, Equity relieves; damages for the non-performance of a contract, for which pecuniary compensation can be made, may be reduced to a sum of money; Equity regards a penalty for the non-performance of such a contract as designed merely to secure that sum of money; therefore, the penalty being, if you look into it, designed in point of fact only to secure money, will be relieved against. Once grant the premises, and it is not easy to avoid the conclusion. It does not at present concern us to inquire into the abstract merits of this extension of Equitable jurisdiction. Let it be granted that there are grounds on which it may be justified, but if the "original intent of the case" is all that is to be looked to, it is surely carrying astuteness to the verge of absurdity for the Court to discover within the four corners of a document whereby A.

agrees to buy B.'s house for £1,000, on pain of forfeiting £100 to B. if he fails to carry the agreement into effect, that the real intention of the parties was not that A., on refusing to complete his purchase, should pay B. £100, but that B. should merely have the right to recover from A. such damages for breach of contract as the Court or a jury might be disposed to award ; a right which B. would have enjoyed none the less if no penalty had been stipulated for, though in that case he might have run more risk of not getting his money. But we are by no means prepared to assert with confidence that such a construction would not recommend itself to the Judicial intellect. Indeed, it would appear from the Reports that long after the full-blown doctrine came into operation the Judges continued to "lay the flattering unction to their souls" that they were effectuating the true intention of the parties.

That this should be so is, after all, scarcely a matter for surprise, for when we reflect on the somewhat analogous doctrine of conditions *in terrorem*, we appreciate the difficulty of assigning any limit whatever to the ingenuity of the Judges in the construction of the English language. Persons capable of deciding that a testator who gives £100 a-year to his widow, to cease on her marriage, does not really mean the annuity to cease, but only that his widow should think so, and thereby be intimidated into remaining faithful to his memory, clearly do not hold themselves bound by any of the ordinary canons of construction ; and surely it by no means exceeds the bounds of possibility that such persons should hold the insertion of a penalty for the non-performance of a contract to be intended merely as a means of frightening a contracting party into performing his agreement, on the chance that he might suppose (contrary to the fact) that it was really intended to enforce the penalty in the event of his failing to fulfil his obligation.

But whatever the precise line of argument may have been by which the Judges justified themselves in supposing that

they were carrying the intention of the parties into effect by decreeing that penalties ought to be considered merely in the light of a security for the payment of any damages that might be assessed, it is abundantly clear that the doctrine professed to be based exclusively on the "original intent of the case;" and, as we have seen, that continues, according to the best authorities, as expounded in Tudor's Leading Cases, to be the only ostensible ground on which relief is given. Nevertheless, of late years it has been repeatedly held that the only question to be decided is whether the sum to be paid on the non-performance of an agreement can, in point of fact, be regarded as liquidated damages, or whether it comes under the head of a penalty, and if the latter construction is adopted relief is given as a matter of course, so that in effect the Judges now act on the principle that relief against penalties will always be given. Now the bare proposition that Equity relieves against penalties is somewhat broader than that laid down by Lord Macclesfield; his proposition is that Equity relieves against penalties *which were not originally intended to be enforced*, an important qualification, of late entirely ignored. If relief against penalties is not given on grounds of public policy, but only because of the assumed intention of the parties, there can be no reason why the parties should not declare how their contract should be read, and if they choose to declare that what the Court would otherwise deem to be a penalty shall be considered as liquidated damages agreed upon between them, then, according to Lord Macclesfield and the earlier cases, Equity would have no ground for interference. This would seem to be the view taken by Lord Eldon, who says (*Shackle v. Baker*, 14 Ves. 469) that under a covenant upon sale of good-will not to carry on the same business as the purchaser, the parties may proceed to ascertain for themselves what shall be the damages for the breach of it, "and unless they are so awkward as to put that in the shape of penalty instead of

liquidated damages, there is a perfect and absolute remedy." Still more to the point are the observations of Chief Justice Gibbs in *Barton v. Glover* (Holt, N. P. 43), who, after observing that in *Astley v. Weldon*, 2 B. and P. 346 (sometimes cited in favour of the view that declarations of intention are not conclusive), there was no stipulation that the damages should be liquidated, said with regard to a clause providing that a sum named to be paid on breach of covenant should be considered as liquidated damages, "In the present case, unless the damages are to be considered as liquidated, and definitely ascertained by the parties themselves, the clause in the agreement means nothing."

It would appear then that in the year 1816, when this judgment was pronounced, the authorities favoured the view that although, in the absence of any express declaration by the parties, the Court would look at the whole agreement and collect therefrom whether a sum to be paid on the non-performance of it should be regarded as a penalty or as liquidated damages, nevertheless the express declaration of the parties should always be conclusive. If the "original intent of the case" is all that is to be looked to, surely it follows, as a matter of course, that this should be so. What the Judges have to decide, according to their own showing, is not whether a certain sum which A. has engaged in certain events to pay to B. is or is not, as a matter of fact, in the nature of a penalty, but whether A. and B. really intended payment of it to be enforced, and an express declaration by them that the sum in question shall be considered as liquidated damages is surely quite conclusive on this head, whatever in point of fact may be the real nature of the payment. The only possible object of christening a penal sum by the name of liquidated damages is to rebut the assumption on the part of the Court of Chancery that penalties are not intended to be enforced. A. and B. enter into an agreement; neither Law nor Equity forbid them from putting any price they please on the non-

observance of any part of it, although the price agreed upon may be clearly in the nature of a penalty (*e.g.*, where it is agreed to pay hundreds of pounds in case of a breach that a few shillings would put to rights), provided only that they succeed in making their intention sufficiently plain. Since Equity assumes that penalties are not intended to be enforced, clearly the only way of expressing that Equity is in their case mistaken in its assumption, is to call what is, in fact, a penalty by the name of liquidated damages, and, in accordance with this view, the Judges have over and over again declared that where the parties have put their own price upon *any particular breach* of any agreement, the whole amount may be recovered as liquidated damages, notwithstanding that the breach might be set right by the payment of a much smaller sum, except, perhaps, where it consists merely in the non-payment of a definite sum of money (see *Kemble v. Farren*, 6 Bing. 141) so as to bring the case within the statute of Anne against enforcing the penalty on money bonds.

To any but a lawyer it must seem a strange thing that two persons wishing to bind one another to a perfectly legal agreement should have no other way of carrying their wishes into effect except to declare that they desire the Court to put an unreasonable construction on their agreement. If, however, by any contrivance, no matter how childish, it were possible for persons to reckon with reasonable certainty on being able to frame a perfectly legal agreement so that it could be enforced, there would be comparatively little to complain of. If the Judges had had the courage to adhere without flinching to the rule that whenever the contracting parties called a penalty by the name of liquidated damages, it should be deemed that they intended that penalty to be enforced, then a clear and definite rule would have been established, so that persons, with the aid of a competent lawyer, might effectually have prevented the Court from interfering with their wishes.

Unfortunately, the Judges, while still professing to be guided entirely by the intention of the parties, and recognising in many cases the abstract right to recover penalties however extortionate, provided only they are called liquidated damages, have adopted a course which often amounts in practice to a denial of that right of free contract which in theory they profess to respect. Where an agreement is capable of several breaches of different degrees of magnitude, it is practically impossible to frame a clause of forfeiture which can be enforced. It will not do to stipulate that if the agreement is infringed *in any particular* a specified sum shall be payable as liquidated damages, "for," as Baron Parke observed in *Horner v. Flintoff* (9 M. and W. 678), "where parties say that the same ascertained sum shall be paid for the breach of every article of an agreement, however minute and unimportant, they must be considered as not meaning exactly what they say;"* so that what has been declared to be liquidated damages will be construed as a penalty, which will not be enforced, no matter how gross the breach may have been. The Law on this subject has been stated by the Privy Council (*Dimech v. Corlett*, 12 Moo. P.C., p. 229) as follows:—"The Law of this country on the question of penalty, or liquidated damages, may be considered, after a great number of decisions—not, perhaps, all of them strictly reconcilable with each other—to be, however, at length satisfactorily settled, and the hinge on which the decision in every particular case turns, is the intention of the parties, to be collected from the language they have used. The mere use of the term 'penalty,' or the term 'liquidated damages,' does not determine that intention, but like any other question of construction, it is to be determined from the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great im-

* Really, one would think the Judges had never heard of such a thing as a fiction before.

portance towards the arriving at a conclusion ; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to the breach of all, or any of them, was intended to be a penalty, and not in the way of liquidated damages."

Baron Alderson, indeed, in the above-mentioned case of *Horner v. Flintoff*, suggests that "where some breaches relate to important, and others to unimportant, matters, parties ought to annex a specific penalty to each breach." This suggestion clearly fails to meet the difficulty, and its inadequacy is well illustrated by the very agreement that called it forth.

By that agreement the Defendant promised to buy the good-will, stock-in-trade, and tenant-right of the Plaintiff, who was an innkeeper and farmer. The Plaintiff promised to give the Defendant possession of certain premises together with furniture, farming stock, etc., and in the mean time to pay rates, taxes, etc., and indemnify the Defendant from all costs and expenses by reason of the non-payment of the same. The Defendant promised to pay £100 for the tenant-right, to take the furniture, plate, etc., and to pay the amount of the valuation, and all rents, rates, and taxes, and to indemnify the Plaintiff from the same. Surely, it would have puzzled the learned Baron himself to draw a schedule of liquidated damages for every possible infringement of an agreement like this. If any such attempt should ever be made there will indeed be plenty of work for the lawyers. What delightfully perplexing questions might arise out of every item in such a schedule ! Testators who make their own wills (including even ex-Chancellors) are well known to be a godsend to the lawyers ; how much more the parties who should endeavour to schedule every possible infringement of their agreement. Practically, then, the performance of agreements, of which there may be

many breaches, cannot be secured by means of penalties, nor even can moderate damages for the breach of such agreements be settled by contract between the parties, except, perhaps, to a very limited extent, for certain specified breaches capable of being accurately defined. For this unsatisfactory result, which has, of late years, not escaped severe judicial comment, it is difficult to say whether Law or Equity is most to blame.

The cases limiting the right of persons to have their intentions carried into effect by calling penalties by the name of liquidated damages were all of them decided at Common Law, nominally under a Statute of William III., instead of under the Rule of Equity as enunciated, though not apparently for the first time, by Lord Macclesfield; but as it is the unanimous opinion of all the Judges who have ever discussed the point that the Statute was only passed in order to import the Equitable Rule into the Courts of Law, and thereby do away with the necessity of going into Equity for relief, and that the same rule does and ought to obtain in both *Courts*, or, as we now say, *Divisions*, it would seem that Equity is the original offender. But then we must recollect that Equity had, in some cases, a good excuse for interference, owing to the very singular circumstance that persons were in the habit of putting their hands to agreements which did not in fact express their real meaning, a state of things for which the technicalities of the Law were presumably responsible.

There is another doctrine connected with the law of penalties which adds to the difficulty of extracting any intelligible principle from the cases. It has been shown that in the case of a complicated agreement involving many possible breaches, a penalty extending to every breach cannot be made enforceable under the name of liquidated damages, and it has frequently been held that an agreement to buy a public-house, even where the agreement contains no complicated stipulations as to indemnity,

valuation, &c., comes within the category of agreements to which no enforceable penalty can be attached. Oddly enough, however, though no penalty, either *eo nomine* or under the guise of liquidated damages, can be stipulated for, yet it is perfectly lawful to stipulate that the intending buyer shall, on signing the contract of purchase, pay a deposit, and that in the event of his declining to complete the sale that deposit shall be *forfeited*. It has lately even been held (*Hinton v. Sparkes*, L.R. 3, C.P. 161) that under such a clause of forfeiture an action may be brought on an I.O.U. which has been accepted as a deposit instead of a cash payment.

It is difficult to see on what principle the mere fact of an intending buyer having paid, or promised to pay, a deposit on the purchase-money, should render him liable to a penalty for the non-completion of his purchase, which, but for such payment or promise to pay, could not have been enforced.

The fact is that the assumption of the Court of Chancery, ratified to some extent by statute, of the power of construing written agreements, not according to the plain meaning expressed by the parties, but according to what the Court may consider ought to have been their meaning, has resulted, and could not but result, in numerous contradictions and absurdities. It is often difficult enough to put a satisfactory construction on written agreements, even starting with the assumption that the intention of the parties was to express within the four corners of the agreement what they really meant; but if we start with the contrary assumption, that the parties do not mean what they have said, but something else which the Court is of the opinion, under the circumstances, they ought to have meant, we have clearly constructed for ourselves a very pretty puzzle indeed.

We have already observed that we are willing to give Equity the credit of having been actuated by the best of

motives in tampering with the plain meaning of written agreements, but the policy of the Court, though doubtless well intentioned, was, we cannot help thinking, a mistaken one. The doctrine of relief against penalties, if it is to be justified at all, must be justified on very different grounds from those hitherto assigned, and restrained within very narrow limits. We are aware that, from time immemorial, it has been, and still is, the invariable practice to instance the interference of Equity on behalf of the oppressed mortgagor as an ever memorable example of the courage and dexterity with which the Chancellors frustrated the iniquities of the Law, and contrived to do complete justice between man and man. At first sight this view of the case, no doubt, seems plausible enough. It is certain that the legal position of a mortgagor is one of intolerable hardship, and it is equally certain that although the law of mortgages is by no means free from doubt and difficulty, an ordinary mortgage deed does, owing to the intervention of Equity, work substantial justice between borrower and lender. Equity, then, has provided an efficacious remedy against a particular form of injustice, and is, so far, *prima facie* entitled to our thanks; but before entering final judgment various considerations must be taken into account which, unless we are very much mistaken, will be found quite sufficient to make us pause, and raise uncomfortable doubts as to whether it was altogether politic to lay down the rule that the intention of the parties to an agreement is not always to be deduced from the plain meaning of the document they have subscribed, and to invest the Court with full power and authority to bind persons to the observance of a contract very different from the one which they had in fact executed. In estimating the services rendered by Equity to impecunious mortgagors it would seem to be taken for granted that, but for the intervention of Equity, they would constantly be obliged to submit to the grossest injustice under sanction of the

Law. The form of mortgage deed at present in use has, with a few variations, served for so many generations the turn of thriftless landlords and thrifty capitalists, that, at last, it has become impossible for the legal mind to conceive the notion of land being made available for purposes of borrowing, except through the instrumentality of a document drawn up in accordance with the precedents of Bythewood or Davidson. In making this assumption the profession have greatly underrated both the common sense of mankind and their own ingenuity. It appears to us very certain that if Equity had not interfered the result would have been, not the wholesale and continuous ejection of landlords from their ancestral tenements (which is the view of the case always presented to the law student), but the overthrow of the present absurd form of mortgage, and the substitution of another expressing, in clear and distinct terms, the real agreement between the parties. Equity, by the very process of healing over the surface, has perpetuated, instead of extirpating, the disease it professed to doctor, and, to our thinking, the last state of the patient is worse than the first.

If the only result of patching up the relations between mortgagor and mortgagee had been to perpetuate a form of mortgage purporting to bind persons to stipulations they never intend shall be carried into effect, that of itself would be no inconsiderable evil, for it is quite unworthy of a civilised people that one of the commonest forms of contract should be drawn up in such a way as to require the interposition of the Court of Equity to prevent the perpetration of a gross injustice. Such a clumsy method of doing justice between man and man might recommend itself in an archaic state of society, which delights in tricks and fictions, but is quite out of place in a nation that has deliberately done away with Messrs. John Doe and Richard Roe, Fairtitle and Goodright, and is laying to heart the important lesson that justice ought to be dealt out in a

straightforward and intelligible manner. Unfortunately, the heroic remedy adopted for the relief of mortgagors has, as we have seen, led to other results more serious than the retention of an absurd form of mortgage deed. The refined instinct, by virtue of which the Equity Judges felt themselves competent to discover the real intention of the parties to a mortgage, without any other evidence than that afforded by a deed, in which a very different intention had been expressed, was soon brought to bear upon other contracts besides mortgages, to the great gain of the profession and the consternation of contracting parties, who found their agreements construed for them by the light of rules which to the minor disadvantage of entirely defeating the obvious intent of the contract, added the more serious evil of practically curtailing the acknowledged rights of contracting parties and of being uncertain in their application. Nominally it is perfectly lawful to enforce the performance of an agreement through the medium of liquidated damages, but the result of the decisions is, as we have pointed out, to render it impossible to frame a certain class of agreements so as to enforce payment of the damages stipulated for, while on the other hand some agreements may be easily expressed in such a way as to render them enforceable under the sanction of what is, in point of fact, a penalty.

In allowing parties to name their own liquidated damages, the principle of enforcing agreements through the medium of penalties was admitted; surely then it would be wiser to do away with the vexatious and uncertain restrictions encumbering the exercise of a right which is admitted in all but the name, particularly as these restrictions profess, as we have seen, to be grounded not upon motives of public policy, but only upon a notoriously false presumption as to the intention of the contracting parties. This presumption has now afforded work for the Bar, perplexed the Bench, and exasperated suitors, for two hundred years—a suffi-

ciently long trial in all conscience. In venturing, as we have done, to suggest that written agreements should for the future be construed according to the plain meaning of their contents, we cannot do better than shelter ourselves under the authority of Barons Martin and Bramwell. The former learned Judge, while feeling himself bound by the cases to decide against enforcing a penalty for the breach of the agreement before the Court, observed (*Betts v. Burch*, 28 L. J. Ex. 269) that in his opinion "persons being at liberty to enter into any bargains they think fit, the proper mode of ascertaining what the bargain is, if it be in writing, is to ascertain what the expressed meaning is, and carry out that meaning. If a person has made an improper bargain, it would be a warning to others not to enter into such bargains. A great deal of the difficulty in the administration of the law arises from the having to ascertain what is the meaning of agreements that parties have made; but if the Court of Law were simply to ascertain what the parties have expressed, and carry those expressed bargains out, much of the difficulty would be removed. I consider, however, that I am not at liberty to act upon that view with respect to that question." Mr. Baron Bramwell said, "I quite agree with my Brother Martin in thinking the best possible thing would be to let people make agreements and keep to them, according to their words, till they are tired of it, and then you will find out that this little piece of paternal legislation—[i.e., the Act of Will. III., above referred to]—has introduced a great deal of mischief because it has introduced a great deal of litigation."

ROBERT COLLIER.

V.—SELECT FOREIGN CASES.

Copyright, Artistic.

BELGIUM.—*Pictures. Right of Reproduction.* Court of Ghent, 22nd February, 1876. *Carolus v. Fievez.* (Pasicrisie, 1876, II., 202.)

The sale of a picture, when made without reservation, carries to the acquirer the absolute right of reproduction.

This decision, in accordance with a former decision of the Court of Brussels (6th July, 1871), was based on the principle that the owner of a thing has the right to take all the advantages which it can offer, and that, in the absence of a prohibitory law, a vendor who sells without reservation is held to transmit the property as he owned it, and that the distinction between the ownership of a picture and the right of reproducing it is purely theoretical. The Court quoted the French Law in support of this view.

But it should be noted, as is observed by the *Journal de Droit International Privé* (November—December, 1876) on this case, that a Bill on Literary and Artistic Copyright, laid before the Belgian Chambers, 1858-9, which has not yet become Law, contained a contrary solution of this question.

Copyright, Literary.

(I.) ITALY.—*Title. Generic Title. Change. Advertisement.* Cival Tribunal of Milan, 3rd August, 1874. *Manini v. Pagnoni.* (*Monitore dei Tribunali*, 1874, 929.)

The exclusive right of publication and reproduction recognised in authors by the Law of 25th June, 1865, extends to all parts of a work, and specially to the title. Art. 35 of the above Law applies this doctrine even if the title be generic. By Generic Title is to be understood one to which another epithet is usually added, such as Dictionary, History, Treatise, Guide, &c.

The title, "Every Man his own Lawyer" (*l'Avvocato da sè stesso*) is not generic. It is an infringement of this title to give another work such a title as "The Family Lawyer" (*l'Avvocato di Famiglia*), because notwithstanding the change of the last words the identity of the first word is sufficient to cause confusion. The exclusive right to the title of a work may be exercised from the moment of the publication of an advertisement in which the title is set forth as that of a new work; it is not necessary that the book should have appeared.

(2.) *Title. Advertisements. Author. Publisher.* Court of Appeal, Milan, 14th December, 1874. *Pagnoni v. Manini.* (*Monitore dei Tribunali*, 1875, 164.)

The advertisement of a work is essentially distinct from the work advertised, and the title announced in an advertisement is not to be confounded with the title of the work itself. It is not an infringement of copyright when the title of a work is reproduced in the advertisements of a different work, but is not placed on the copies of the new book. It would only be an infringement if special circumstances showed the intention of a dishonest competition by means of the advertisements.

A publisher may have the property in a title through having caused the work to be compiled.

The *Journal de Droit International Privé* (March—April, 1876), observes upon these Judgments that "mala fides," which the Court of Appeal held had not been proved in the case before it, is a constituent element in literary, as distinguished from industrial piracy (*contrefaçon*), and refers to a Judgment of the French Court of Cassation, 13th January, 1866 (*Sirey*, 1866, I., 267).

(3.) *Photograph. Intellectual Work. Work of Art.* Court of Appeal, Rome, 17th July, 1875. *Sbriscia v. Rinaldini.* (*Casaregis*, 1875, II., 207. *Monitore dei Tribunali*, 1875, 165.)

A photographic portrait is not an intellectual work.

The essential condition for an intellectual work is that

the productive power of the mind should be dominant in it. But this condition is wanting in the work of the photographer. Still less can photography be classed with drawings, for while the creative power of the designer is revealed in every movement of his hand, the photographer's mind can exercise no influence over the chemical action which produces the negative.

Italian Legislation, not considering photography to be of the nature of a publication or reproduction, has assimilated it, in the Law of 25th June, 1865, Art. 20, on the Rights of Authors, to any other kind of proceeding by which the identity of a work of art may be established.

Consequently, the reproduction of a photographic portrait without the authorisation of its first publisher is not an infringement of the Law on Rights of Authors.

On the case of *Sbriscia v. Rinaldini*, the Journal de Droit International Privé remarks, that the question raised in it has been frequently brought before the French Courts, and that conflicting judgments have been given, but that an intermediate view tends to prevail, admitting that a photograph may be recognised as a work of art, but is not necessarily so. Reference to Court of Appeal, Paris, 10th April, 1862, and 29th November, 1869, Court of Cassation, Paris, 28th November, 1862 (Sirey, 1863, I., 41, and 1870, II., 77). But *cf.* Court of Appeal, Turin, 25th October, 1851 (Duron), to same effect as *Sbriscia v. Rinaldini*.

(4.) *Tables of Agreement. Administrative Authority.* Court of Appeal, Rome, 11th October, 1875. *Angelelli v. Paravia.* (Legge, 1875, 843.)

Tables of Agreement between old and new weights and measures are not an intellectual work. The publication of such Tables, drawn up on the plan of other Tables, is not piracy. The registration of the first published Tables, in the Register of Copyrights kept by the Administrative Authority, is of little importance. The Judicial Authority alone decides questions of private property.

It may be noted on this case that, in France, the character of a work susceptible of being private property has been, according to the circumstances of the case, allowed or refused to compilations of the nature of Almanacks, Annuals, Guides, Tables, Catalogues, &c. (Aix, 10th February, 1862, Sirey, 1866, II., 228.)

Italian Law of 10th August, 1875, on Rights of Authors.

The Italian Law of Copyright of 25th June, 1865, referred to in *Sbriscia v. Rinaldini*, having given rise to some difficulties in its application, the subject was taken in hand by the Ministry, in 1875, and a Bill on Dramatic Copyright brought in and passed. We transcribe its provisions, together with those of the Norwegian Law of 1875, from the *Annuaire de la Société de Législation Comparée*, 1876 (Paris, Cotillon).

Art. 1. The author of a work fit to be represented on the stage (*opera adatta a pubblico spettacolo*), whether unpublished, or published by printing, or in any other way, has over it the exclusive right of representation and execution, on condition of his having accomplished, whether with regard to publication or representation, the formalities required by ch. iii. of the Law of 25th June, 1865, where they do not differ from the following provisions:—

Art. 2. No one may bring out or produce a work fit for representation on the stage, and subject to the exclusive right mentioned in Art. 1, without the consent of the author or his agents.

Art. 3. The exclusive right of representation and production belongs to the author and his representatives for eighty years from the first representation or publication of the work. After this period, the piece becomes public property in regard to representation and production.

Art. 4. The declarations to be made respecting unpublished works fit for the stage, and of which it is desired to reserve the exclusive right of representation and production,

must be accompanied by a MS. of the work, which will be restored after receiving the "visa" of deposit.

Art. 5. The "tempus utile" for the declaration and deposit required to secure the author's rights is three months from the date of publication, in whole or in part, or from the first representation, in the case of works intended for the stage. A later deposit and declaration will be equally efficacious, save in cases where, during the time which elapsed between the period abovenamed and the date of making the deposit and declaration, third parties shall have re-produced the work, or have procured copies from abroad for sale. In such cases, the author shall only be able to oppose the sale of copies to the extent of the number already printed or imported. Failing agreement on the mode of carrying out this disposition of the Law, the Judicial Authority shall decide.

Art. 6. The extracts of declarations made, whether within the "tempus utile" or later, shall be published monthly, by the Government, in the Official Gazette of the Kingdom.

Art. 7. When the interested parties cannot agree as to the annulling, modifying, or transferring of the declarations previously made, it belongs to the Judicial Authority to take cognisance of the case by summary procedure, conformably to the rights recognised and the rules laid down by the present Law and that of 25th June, 1865, No. 2,337. The Government, on the demand of the interested parties, and at their expense, shall publish, as an appendix to the next publication of the extracts of declaration, the annulments, modifications, and transfers ordered by the Judicial Authority, and also those agreed upon between the parties, or brought about by inheritance.

Art. 8. The present Law is retrospective in its force in regard to works already published, represented, or produced.

If the "tempus utile," fixed by Art. 25 of the Law of 25th June, 1865, is not yet passed, the period appointed by

Art. 5 of the present Law shall be observed so soon as it shall have taken effect.

Norwegian Law of 22nd May, 1875, on the Authorisation of Dramatic Representations.

We give the Articles pertinent to the subject of Copyright of a Law on the authorisation of dramatic representations, of which the preceding portions relate only to formalities to be observed in order to obtain permission to put a play on the stage, &c., and we therefore only print from Art. 7 to the end.

Art. 7. No dramatic work, or musical composition, intended for the stage can be publicly represented without the consent of the author, if he be a Norwegian citizen. Neither the rehearsal of a work, or portions of a work, without stage properties (*mise en scène*), nor the rendering in a concert of the overture, or detached pieces of a musical composition, shall be deemed public representations.

Art. 8. The transfer, by consent of the author, to another person of the right to reproduce his work does not prevent the author, unless the contrary be expressly stipulated, from granting the same right to a third party, and this right shall be enjoyed by the author in any case in which the work, or composition, shall not have been publicly represented by the grantee of the exclusive right of representation within five consecutive years.

Art. 9. The rights of the author, as laid down in Art. 7, pass on his death to his widow, or, if he be a widower or unmarried, to his heirs, but only for a period of thirty years from his death. If the author dies without leaving a widow or heirs, the representation of his work is absolutely free, unless he shall have transferred his rights to another person, according to the provisions of Art. 8, in which case the grantee, or the persons on whom the rights may have devolved by succession or contract, shall preserve the said rights, save in the case of stipulation for a shorter time, for

thirty years after the decease of the author. Beyond this period, the representation is entirely free.

Art. 10. The unauthorised representation of dramatic or musical works is punished by fines. The person found guilty must be condemned in damages to the injured party. The action is a private one if it has not been brought within one year of the illegal representation.

Bills of Exchange.

ITALY.—*Simultaneous Hearing. Delay of Judgment. Different Parties and Interests. Negotiator. Acceptance. Payment when refused by Drawer to be had from Drawer and Endorsers.* Court of Appeal, Palermo, 6th September, 1876. *Florio & Co. v. Lo Meo.* (Circolo Giuridico, Vol. VIII., 1877, Fasc. I., Decisioni Civili, p. 26.)

This was an Appeal from the Tribunal of Commerce of Palermo, involving (1) the question of simultaneous hearing of two causes (*riunione di due cause*), or suspension of Judgment “pendente lite;” (2) the question against which party an action lies when payment of a Bill of Exchange is refused, either on a technical plea (*difetto*), or from want of funds to meet it (*insufficienza di fondi*).

The case arose thus. On 15th April, 1875, Lo Meo, a trader in Palermo, gave an order to Pellegrini Brothers, representatives there of the firm of Protin, Dubè, and Lenoble, of Rheims, for certain woollen, flannel, and merino goods, for his business, to be delivered to him by the end of August of the same year, insured, per Messageries Maritimes, payment to be made, six months after delivery, in gold or silver, without discount. On 28th November, 1875, the merinos alone came to hand, were landed on the 1st December, and taken out of the Custom House by Sigr. Lo Meo on the 2nd December. On 25th January, 1876, Sigr. Lo Meo claimed damages from Pellegrini Bros. for their non-fulfilment of the order for flannels, and for their delay in despatch of the merinos, and invited them to

a friendly settlement (*amichevole liquidazione*). Pellegrini Bros., without denying the facts recited, alleged that they were not the passive representatives (*allegavano non avere rappresentanza passiva*) of Protin and Co. On 9th March, 1876, Lo Meo summoned both Pellegrini Bros. and Protin and Co. before the Tribunal of Commerce of Palermo, for damages as above.

Meanwhile, on 10th February, 1876, Protin and Co., had drawn at the bottom of an invoice (*fattura*), apparently dated 13th October, 1875, a Bill of Exchange to their own order (*all' ordine di sè stessa*) on Sigr. Lo Meo, for two thousand one hundred and seventy-one francs, twenty-five centimes, the price of the merinos, payable 15th April, 1876, which Bill they transferred to the Comptoir d'Escomptes (*cassa di sconto*) of Paris, by whom it was endorsed (*girata*) to Florio and Co.

Lo Meo refused payment when the bill was presented to him, and appended the reasons of his refusal to Sigr. Florio's protest. Instead of taking advantage of the powers given him by Arts. 205 and 250 of the Italian Commercial Code, of suing the Drawer and Endorsers jointly (*solidalmente*), Florio summoned Lo Meo before the Tribunal of Commerce, whereupon the latter claimed that the two causes should be heard together, or, at least, that Judgment should be delayed in the case raised by Florio until a decision had been given in the matter pending between him and Protin and Pellegrini. The Tribunal of Commerce rejected this claim, and gave sentence in favour of the Plaintiff (Florio), on 18th July, 1876. Lo Meo appealed on the grounds which constituted his defence in the Court of First Instance.

The Court of Appeal *Held*, on the question of simultaneous hearing, that there was a formal objection, because such a claim must, according to Art. 229 of the Order of Judicial Procedure (*Regolamento Giudiziario*), be made to the President of the Tribunal of Commerce at least three

days before the cause came on for hearing in First Instance; and a substantial objection because the cases covered different ground, both as to procedure and parties. But on the question of delay of Judgment till decision of the other cause, *Reversed* Judgment of Tribunal of Commerce.

On the question against whom an action lies on dishonour of a Bill of Exchange, the Court of Appeal *Held* that, according to Art. 203 of Comm. Code, acceptance supposes the provision of funds by the Negotiator, and establishes proof of funds in the cases of the Holder and Endorsers. But when the Drawer dishonours a Bill, either on a technical plea (*difetto*), or for want of funds, the Holder cannot compel payment by the Negotiator (*trattario*), but has only the right, according to Arts. 205 and 250 of above Code, to sue the Drawer (*traente*) and Endorsers (*giranti*), who are joint guarantors (*garanti in solido*), both of the acceptance and of the payment.

[On this *cf.* Court of Appeal, Turin, 8th July, 1870, *Annali*, IV., pt. II., p. 528; Nougier, last edn., I., n. 439 and 511; Casaregis, disp. CLI., n. 4, vol. III., p. 196.]

Reviews of New Books.

Revue de Législation, Ancienne et Moderne, Française et Etrangère. Publiée sous la direction de MM. LABOULAYE, DE ROZIERRE, GIDE, DARESTE, BOISSONADE, FLACH. Paris: E. Thorin. Last No., November-December. 1876.

Revue Générale du Droit, de la Législation, et de la Jurisprudence en France et à l'Etranger. Dirigée par MM. DELOCHE, de l'Institut; H. BROCHER, de Genève; Sir H. SUMNER MAINE, &c. Secrétaire de la Rédaction, Joseph Lefort, Avocat à la Cour d'Appel, Lauréat de l'Institut. Paris: E. Thorin. No. 1, January-February. 1877.

Nouvelle Revue Historique de Droit Français et Etranger. Publiée sous la direction de MM. EDOUARD LABOULAYE, de l'Institut; EUGÈNE DE ROZIERRE, de l'Institut; PAUL GIDE, Professeur de Droit; RODOLPHE DARESTE, Avocat au Conseil d'Etat; GUSTAVE BOISSONADE, Agrégé. Secrétaire de la Rédaction, Jacques Flach, Dr. en Droit, Avocat à la Cour d'Appel, Paris. Paris: L. Larose. Nos. 1 and 2, January-February, March-April. 1877.

We have here satisfactory evidence of considerable activity in the field of Juridical Literature in France. The Review so long under the direction of M. Laboulaye and his colleagues has changed its title and its publisher, and promises a career of renewed usefulness to the student of historical and comparative jurisprudence, under its old leaders, "aliisque et idem." M. Thorin, on his part, deserves well of the Republic of Letters for the prompt enterprise with which he has brought out a fresh Review, to which the Corpus Professor of Jurisprudence in the University of Oxford, M. H. Brocher, Professor of Law in the University of Geneva, and our old friend M. Joseph Lefort, together with distinguished members of the French Bar and Magistracy, lend their aid. It appears to us, so far as the materials for forming a judgment are as yet before us, that the "Revue Générale" is likely, under the inspiration of M. Lefort and others, to devote no small portion of its labours to the elucidation of subjects connected with Penal Law, and Economical Science in its relations with Jurisprudence, branches

in which the author of the history of "Locations Perpétuelles," and the "Cours de Droit Criminel," is thoroughly at home. These important subjects are already opened up in articles by M. Lefort, on the "Droit de Marché," and M. Labatut, in the first of a series of papers on "Moral and Legal Responsibility in Crime and Madness." In the "Nouvelle Revue Historique," the title assumed is amply justified by Professor Rivier, of Brussels, in a valuable essay on the little-worked field of the "History of the Science of Law in the Middle Ages;" and by M. René de Maulde, who contributes, in a paper extending over the first two numbers, a most graphic and interesting account of the "Customs of the Republic of Avignon in the Thirteenth Century." In the second number, M. Daresté brings out into strong relief the light thrown by an Ephesian Law of the first century, B.C., discovered by Mr. Wood in his excavations at Ephesus, on Greek and Roman Law, and so on all Jurisprudence. We must add that the Bibliographical Appendix to the "Nouvelle Revue Historique" is at once wide in its field and well classified, and promises to be a very useful feature.

The Law of Mortgage and other Securities upon Property. By WILLIAM RICHARD FISHER, of Lincoln's Inn, Barrister-at-Law. Third edition. 2 vols. Butterworths. 1876.

During the twenty years which have elapsed since the appearance, in one volume, of the first edition of Mr. Fisher's Treatise on the Law of Mortgage, but more especially since its second edition—when the author's exhaustive treatment of his subject necessitated a division into two volumes—this work has built up for itself in the experienced opinion of the profession a very high reputation for carefulness, accuracy, and lucidity. This reputation is fully maintained in the present edition. The author has availed himself of the results of his labours while employed by the Digest of Law Commission, to effect several improvements in the form of the work, which add to its value as a scientific legal treatise. Some of the earlier portions, more particularly those parts of the first and second chapters which treat of Equitable Mortgages, Pledges, Hypothecations, and Possessory Liens, have been re-written, and are now presented to the reader in a shape as nearly as possible identical with the completed part of the intended "Digest of the Law of Mortgage and Lien." A valuable Appendix to the second volume contains a selection of Judgments, and statutory

securities, such as those under the Ecclesiastical Benefices Act (Gilbert's Act), 1798, Charitable Trusts Acts, Commissioners' Clauses Act, 1847, The Companies Acts, Copyhold Enfranchisement Acts, Improvement and Inclosure Acts, Lands Clauses Consolidation Act, 1845, Municipal Corporation Acts, and the Railway Companies Securities Act, 1866. The Appendix concludes with an Analytical Table of stamps upon securities. The entire work is divided, not only into chapters and parts, but also into numbered paragraphs, amounting, including those of the Appendix, to 1857. This arrangement is, no doubt, useful, but in the absence of any direction to the reader, the frequent references to previous and subsequent paragraphs scattered throughout the Appendix, are apt at first to be somewhat puzzling.

The foot-notes throughout Mr. Fisher's Treatise throw light upon his text, from the varied sources of the Roman Law, the Laws prevailing in our Colonies, the Code Napoléon, and other Foreign Systems.

The Law of Securities upon Property is confessedly intricate, and, probably, as the author justly observes, "embraces a greater variety of learning than any other single branch of the English Law." At the same time an accurate knowledge of it is essential to every practising barrister, and of daily requirement among solicitors. To all such we can confidently recommend Mr. Fisher's work, which will, moreover, prove most useful reading for the student, both as a storehouse of information and as an intellectual exercise.

Transactions of the National Association for the Promotion of Social Science. Liverpool Meeting, 1876. Edited by C. W. RYALLS, LL.D. Longmans. 1877.

To many, both of our countrymen and of our Transatlantic kinsmen, the port of Liverpool is at once the "first and last" in England, like the famous inn by the Land's End. Its importance as a meeting-ground for the Members of the Social Science Association may be estimated by a perusal of the volume now before us, the publication of which forms the last editorial monument of the General Secretaryship of Mr. C. W. Ryalls. Maritime questions naturally attracted considerable attention at Liverpool, but not by any means exclusively, or even preponderantly. Extradition, Bankruptcy Law Amendment, the Causes and Remedies of the Depreciation of Silver, and other

important subjects of the day received their due meed at the hands of Mr. Westlake, Q.C., M. Cernuschi, Mr. Giffen, Mr. Daniel, Q.C., and other well-known writers. The interesting and suggestive address of the President of the Jurisprudence Department, Mr. Farrer Herschell, Q.C., M.P., has already appeared in our columns, and for the rest of the valuable matter contained in the other addresses and papers, we must refer our readers to the volume itself. We congratulate Mr. Ryalls on so successful a conclusion of his labours, and so excellent a comment on the work to which he may well be content to have given four of the best years of the life of a practising Barrister.

An Essay on Intestate Successions according to the French Code.
By BARTHELEMY H. COLIN, of the Middle Temple. Stevens & Sons. 1876.

The Succession Laws of Christian Countries, with Special Reference to the Law of Primogeniture as it exists in England.
By EYRE LLOYD, B.A., of the Inner Temple, Barrister-at-Law. Stevens & Haynes. 1877.

We have here two contributions of a different calibre, both intended to be of use to the practitioner who requires a knowledge of Foreign Law on the important subject to which they relate. Mr. Colin writes primarily for those who whether in the colony itself, or on Appeal cases at home, have to deal with the French Law obtaining in the Mauritius. Why he calls his book an "Essay" we have not been able to discover, for he adheres even to the form of the original in regard to question and answer, and the introduction of "*Quid*" in the middle of a paragraph, which cannot but have a somewhat odd aspect to the English reader. His references to the affirmative and negative opinions of the principal Commentators on the Code would have been more practically useful if the pages or sections where they may be found had been given, for they are to a certain extent the "*Responsa Prudentum*" of the best French jurists. We should have expected Mr. Colin to have revised with greater care the technical terms which he prints in the language of the Code.

Mr. Eyre Lloyd compresses into little more than eighty pages a considerable amount of matter both valuable and interesting; and his quotations from Diplomatic Reports by the present Lord Lytton, and other distinguished public servants, throw a picturesque light on a narrative much of which is necessarily

dry reading. We can confidently recommend Mr. Eyre Lloyd's new work as one of great practical utility, if, indeed, it be not unique in our language, as a book of reference on Foreign Succession Laws. But we confess we had hardly thought that the study of Roman Law had fallen to such a low ebb with Members of the Inns of Court, that either Barristers or Students should have needed to be told that the Civil or Roman Law was "collected and digested by the Emperor Justinian in the sixth century." On some points Mr. Lloyd's statements are too brief for entire accuracy, as when he tells us, under the head of Greece (p. 49), that "there is no Civil Code in Greece." It is quite true that the Code is not yet promulgated, but a complete Draft Civil Code has existed since 1870, and was revised in 1874. This Draft Code differs in no slight measure from the French Code, while the Ionian Civil Code of 1841, still in force in the islands, is almost entirely identical with it. It is not a little curious to contrast Mr. Lloyd's quotations from Montalembert, in favour of the English system of Entails, with the reform of that system supported by Mr. Shaw-Lefevre in the House of Commons, and also urged by him in a paper lately read before the Law Amendment Society. In a future edition, we may hope that Mr. Eyre Lloyd will discuss these opposite opinions, and also include in his category of "Christian Countries" those lands of the Southern Slavs, at present exciting so much interest in consequence of their intimate relation with the future of the New Rome of Constantine and of Justinian.

A Treatise on the Law of Bankruptcy; containing a full Exposition of the Principles and Practice of the Law, including Alterations made by the Bankruptcy Act, 1869. By GEORGE YOUNG ROBSON, Esq., of the Inner Temple, Barrister-at-Law. Third Edition. Butterworths. 1876.

We are glad to see that Mr. Robson's learned work on Bankruptcy has reached a third edition. As a systematic treatise on the important branch of Law to which it relates, it has long held a deservedly high place in the estimation of the profession. The author has evidently spared no pains to make the present edition worthy of continued support by a painstaking general revision, and by incorporating the results of all important recent decisions affecting both the General Law of Bankruptcy and the Practice under the Act of 1869. In the Law affecting Bankrupts it seems all but hopeless to look for anything like finality. A

Bankruptcy Bill may be expected, as a matter of course, in every Session; and while such is the case it is distinctly advantageous that, in addition to the Law as it exists for the time being, the history of the Law, its objects and leading principles, should be kept clearly and constantly in view. The historical retrospect of Bankruptcy legislation contained in Mr. Robson's work is by no means one of its least instructive and useful features. In the case of the third edition of so well-known a work it is unnecessary to go much into details, especially as the author has retained the original arrangement, correcting and supplementing where necessary. The references to cases are numerous throughout, and the notes are short and to the point. In discussing the alteration in the old law as to Disclaimer by Trustees, effected by the 23rd section of the Bankruptcy Act, 1869, Mr. Robson pertinently remarks (p. 401):—"So far as the clause empowers the trustee to disclaim onerous property and unprofitable contracts it was unnecessary; and so far as it relates to leasehold property it creates difficulties which did not exist under the former Statutes. And the best course would, perhaps, be to repeal the clause and re-enact the 145th section of the Bankruptcy Act, 1849 (which, on the whole, was generally considered to work satisfactorily), releasing the Bankrupt from all liability in respect of the covenants in the lease, whether the trustee accepts or rejects the lease, with liberty for the lessor to prove under the Bankruptcy if the lease is rejected by the trustee." In the Appendix are given the Bankruptcy Act, 1869, the Debtors Act, 1869, the Bankruptcy Repeal and Insolvent Court Act, 1869, with all the various Rules and Schedules of Forms; the Absconding Debtors Act, 1870; the Bankruptcy Disqualification Act, 1871; and the Bills of Sale Acts, 1854 and 1866. The Index is both copious and good.

The Law relating to Mines, Minerals, and Quarries in Great Britain and Ireland; with a Summary of the Laws of Foreign States, &c. By ARUNDEL ROGERS, Esq., of the Inner Temple, Barrister-at-Law. 2nd Edition. Stevens & Sons. 1876.

Thirteen years ago we had occasion to observe that there was a need for the revision of the Foreign Department of Mr. Rogers's work on Mines. We are glad to see an improvement in this respect, and we find from his Preface that he has for the most part had those portions revised by residents in the districts referred to. This is a good precaution to take, but it

does not save Mr. Rogers from a certain antiquarian leaning towards the introduction of obsolete titles and extinct States, or even the reproduction of Laws which the authorities whom he quotes state to have been almost entirely abrogated. We still, as in 1864, have the French Law on Mines of 1791, occupying about six pages of text, although, on p. 37, the Laws of 1810 are stated to have established "Des règles presque entièrement nouvelles."

Perhaps still more striking instances of Mr. Arundel Rogers's antiquarianism may seem to be exhibited in the persistency with which he gives us the Legislation of the old Duchies in Central Italy, and also of "Rome and the Pontifical States," while yet recognising in his text the fact that the soil to which they relate "formerly constituted" those States. This might be considered a lukewarm advocacy of two opposing theories.

It is a more serious oversight, as one pertaining to the quaint terminology of English Law, when Mr. Rogers talks in his Table of Contents of "profits à *pendre* in alieno solo," though he had taken care to have the phrase correct in the text to which it refers at p. 600.

In connection, however, with the more purely English part of his work, Mr. Arundel Rogers gives useful Tables of the Authorities, Statutes, and Cases cited by him, and he also devotes considerable space to the elucidation of the terms "Mines, Minerals, and Quarries," whether occurring in deeds or Acts of Parliament, or according as "local signification" may give them a special interpretation. Special chapters are devoted to the Rights of the Duchy of Cornwall, as apart from the Rights of the Crown, and also to the Rights of Ecclesiastical, Eleemosynary, and Municipal Corporations, Ownership under Trustees in Bankruptcy, and other important divisions of the subject. On the whole, Mr. Arundel Rogers's Second Edition, which is increased by about 200 pages, will afford a really useful, though somewhat bulky, work of reference, alike for the Government Inspector and for the practising Barrister who is engaged in cases involving the Law of Mines. Those who remember how a European complication was very nearly brought about by the case of the Laurium Mines will not be the last to recognise the value of such a Treatise.

A Treatise on the Law Relating to the Pollution and Obstruction of Water-courses: together with a brief Summary of the various

Sources of Pollution. By CLEMENT HIGGINS, M.A, F.C.S., Barrister-at-Law. Stevens & Haynes. 1877.

The Rivers Pollution Prevention Act, 1876, which is given *in extenso* in the Appendix to the volume before us, though moderate in dimensions, and in many respects falling far short of the expectations of sanitary reformers, is the outcome of much thought and inquiry, and of more than one abortive effort at legislation. The importance of the subject of the pollution of rivers is only equalled by the difficulty of dealing with it satisfactorily. Sanitary authorities, whose *raison d'être* is the preservation of the public health, rank with manufacturers among the chief polluters of rivers. The Commissioners appointed in 1868 to ascertain how far the use or abuse of rivers for the purpose of carrying off the sewage of towns and the foul liquids of manufactories could be prevented, without injury to health or manufactures, endeavoured, in their Report, to meet the initial difficulty of defining the word "*polluting*" as applied to liquids. They accordingly recommended ten "Standards of Purity," which met with the strong support of many eminent chemists, and were embodied in the Bill introduced in the House of Lords in 1873. The Select Committee, however, to whom that Bill was referred, impressed with the real difficulties attaching to these tests, struck out the clause containing them, and they were not again inserted in the Bill of 1875, or in the present Statute. The task which the Legislature found too hard for them has thus been cast, in the first instance, upon the County Court Judges, who are empowered to restrain, by summary order, offences against the Act. Some idea of the difficulties in store for our tribunals in determining what constitutes "*pollution*" may be gathered from a case which recently occupied the New York Court for four weeks, during which no less than 186 witnesses, chiefly scientific experts, were examined. * The question raised was whether the slops and whey from a cheese factory could pollute a stream so as to injure the cattle of the Plaintiff, which drank the water. There was a further complaint that this alleged pollution was a nuisance and a source of disease to the neighbourhood. Finally, on the 23rd March, the Jury found for the Plaintiff, with five dollars damages, the amount being purposely made small on account of the heaviness of the costs which the Defendants would have to pay. No prosecution under the English Act can take place until next August, and in the meantime County Court

Judges, Sanitary Authorities, and Riparian Owners will find in Mr. Higgins's Treatise a valuable aid in obtaining a clear notion of the Law on the subject. The *résumé* of the expressed opinion of scientific men on the Standards of Purity, and the summary of the various sources of rivers pollution, will be found especially useful. Part II. of the work is devoted to a short but comprehensive discussion of "Riparian Rights and their Protection," and an Appendix sets forth the principal Statutory provisions relating to water-courses, the vesting of sewers, &c. Mr. Higgins has accomplished a work for which he will readily be recognised as having special fitness, on account of his practical acquaintance both with the scientific and the legal aspects of his subject.

The Theory and Practice of Banking. By H. DUNNING MACLEOD, Esq., M.A., Trinity College, Cambridge, and of the Inner Temple, Barrister-at-Law. Third Edition. Vol. II. Longmans. 1876.

The concluding volume of Mr. Macleod's complete work is quite as interesting as its predecessor, and it is enriched by features of great utility to the practitioner no less than by the vividness of the narrative. Besides his careful analysis of the Evidence before the Committees of both Houses of Parliament, in 1819, Mr. Macleod, in the present volume, enters at some length into the history of Scotch Banking, paying special attention to the well-known failures of recent years, as well as to the earlier case of the Ayr Bank, in 1772. So far as appears, the Ayr Bank might have continued its operations for years without its real insolvency being discovered, but for the accidental failure, through speculations, of a London agent. But it seems to have been based on an economic misconception akin to that of Law, and to have collapsed as suddenly as his magnificent schemes. Nearly a century passes away before we hear of another such catastrophe in Scotland. It raises a similar storm, at the moment, against the Scotch Banking System, but Mr. Macleod marshals a strong array of evidence to prove that the failure of the Western Bank, in 1857, was due to its having throughout the whole of its career "pursued a system which was diametrically opposed to the usual course of the other Scotch Banks." When such a safeguard is neglected as that described in the following terms of a remonstrance by a number of Scotch Banks against the grant of a charter to t

Western Bank, no failure could well astonish us :—"The safeguard of the Scotch system," say the Bankers, whose remonstrance Mr. Macleod quotes (p. 219), "has been the uniform practice adopted of retaining a large portion of the capital and deposits invested in Government Securities, capable of being converted into money at all times and under all circumstances." It is easy to see, of course, that "this requires a sacrifice, because the rate of interest is small;" but it is a sacrifice worth making, if, as the authors of the remonstrance believed, and as Mr. Macleod believes with them, "It has given the Scotch Banks absolute security, and enabled them to pass unhurt through periods of great discredit." The Report of the Committee of the House of Lords, in 1826, had given expression to an equally high opinion of the excellence of the Scotch Banks, which had "for more than a century," they said, "exhibited a stability which they believed to be unexampled in the history of Banking." In his chapter on Theories of Currency, Mr. Macleod gives a full discussion of what he calls "Lawism," and exemplifies his view of its erroneous character by the fate of the celebrated Assignats, in a later period of French History. Law had said that his Paper Currency would not fall below the value of silver, yet the Paper Assignat sank, as Mr. Macleod shows, "to the 30,000th part of its value in silver!"

Chapter XIII., on the Definition of Currency, besides treating the subject historically, and giving, as "constitutional curiosities," excerpts from the Dooms of Edward the Elder, Athelstan, Edgar, and other Anglo-Saxon Kings, also contains an interesting and valuable fragment of the Digest of the Law of Bills of Exchange, &c., which Mr. Macleod prepared for the Digest Commissioners. Here, as in Chapter XVI., on the Business of Banking, the practitioner will find the decided cases noted under the divisions of the subject to which they respectively relate. The various relations in which a Banker may stand to his customer are thus made clear in the light of Judicial decisions, and both parties may profitably study this section, as well as the later portion of the same chapter (p. 475 to end), in which the Law of Credit, Bills, and Notes, is given, in numbered paragraphs, with the illustrative cases, special care being taken to mark the changes effected by the Judicature Act. We have lately read of a good step having been taken by an eminent Banking Firm, which has resolved upon filling up vacancies among its junior clerks by a Competitive Examination. We should think more highly of this plan if we saw included in the subjects of

Examination some testing of the aspirant's acquaintance with the Theory and Practice of that portion of Economical Science which is to be the field of his subsequent labours. To a candidate seeking "honours" in such an Examination, the study of such a work as the "Theory and Practice of Banking" could not fail to be helpful both at the time and in his after career. To all who, whether in the exercise of the Legal Profession, or in the daily business of Banking and other Financial transactions, require at once a clear grasp of Theory and an "Aide-Mémoire" of Case-Law on Banking, we may recommend the careful study of Mr. Macleod's interesting and valuable work.

A Treatise on the Doctrine of Ultra Vires, being an Investigation of the Principles which limit the Capacities, Powers, and Liabilities of Corporations, and more especially of Joint Stock Companies. By SEWARD BRICE, M.A., LL.D., London, of the Inner Temple, Esq., Barrister-at-Law. Second Edition. Revised throughout and re-written, greatly enlarged, and containing the United States and Colonial Decisions. Stevens and Haynes. 1877.

The doctrine which forms the subject of Mr. Seward Brice's elaborate and exhaustive work is a remarkable instance of rapid growth in modern Jurisprudence. Owing its rise, as it seems, almost solely to the great Railway Mania of 1845, it is now prominent on both sides of the Atlantic, and this is the case to such a great extent in the United States that one of our Legal contemporaries there expressed in 1874 the opinion that within the subsequent Decade it would assume a large Political as well as Legal importance. In fact, the value of Mr. Seward Brice's book to the American as well as the English practitioner has been shown not only by a large sale of the English edition in the United States, but also in another way which the defective state of existing arrangements in regard to International Copyright usually renders less satisfactory to author and publisher. An American edition of Mr. Seward Brice's work will not, however, now be needed, as the author has paid great attention throughout the present issue to the decisions of the various Federal and State Courts, as well as to those of the Canadian Courts, in matters affecting the doctrine of *Ultra Vires*. His book, indeed, now almost constitutes a Digest of the Law of Great Britain and her Colonies and of the United States on the Law of Corporations—a subject vast enough at home, but even more so beyond

the Atlantic, where Corporations are so numerous and so powerful. Such bodies form, as our author justly observes, "*an Imperium in Imperio.*" The extent of power which they may attain is as yet, perhaps, more visible in the history of New York and other "Rings" than in our own country; but it is sufficiently perceptible to show us the value of a Treatise so carefully formulating the general principles of the Law, and noticing its specific application in decided cases. Mr. Seward Brice relates that he has embodied a reference in the present edition to about 1,600 new cases, and expresses the hope that he has at least referred to "the chief cases." We should think there can be few, even of the Foreign Judgments and Dicta, which have not found their way into his pages. The question what is and what is not *Ultra Vires* is one of very great importance in commercial countries like Great Britain, and the United States. It might, indeed, have been well for some of the American Railways if the Federal or State Courts had given such a judgment as that by which *Kindersley, V.C.*, in the case of the *Attorney-General v. Great Northern Railway Company*, decided that a Railway Company might not carry on a trade in coal without special authorisation in their Act. Some other decisions as to what is *Ultra Vires* seem scarcely so well founded; but the whole subject has grown up with modern requirements, and is intricate in proportion with the many-sidedness of Modern Civilisation. Corporations have been described as having the attribute of "immortality." It is better, we think with Mr. Seward Brice, to speak of them as having a "continuous identity." The members of a Corporation, in fact, however remotely the successors of those first associated, are clothed with the Legal "persona" of the original Corporators, and perpetuate their identity. The "*Sacra Gentilitia*," so to speak, of the Corporation are duly performed so long as there remain members to exercise the functions required by Law for preserving the continuity of the Body Corporate. And as we may go to the Roman Law for an illustration of the continuous identity of Corporations, so must we for the adequate understanding of the doctrine of Novation—a word which has come into use of late years, and has grown with the same rapid growth as *Ultra Vires*. The principle, indeed, had not to be discovered, but the name given to it by the Roman Jurists was somewhat strange in English ears when recent cases, involving questions under the amalgamation of companies, gave it a striking prominence. It is not likely now to be forgotten; and Mr. Seward Brice takes care to give the relative Texts from the Digest and

Institutes, and from Ulpian, as well as the illustrations inserted in the French Code Civil (Arts. 1271, 1273), of the various modes in which Novation is effected in France. We must confess to a certain astonishment that in his quotation of the Roman Law, at the top of p. 704, the learned writer should have allowed "*pugillus*" to stand for "*pupillus*." But we are aware that sometimes one's very familiarity with a text prevents the observation of errata, and the volume, containing, as it does, nearly a thousand pages of matter, and embracing every possible variety of citation and reference, seems to be, on the whole, singularly free from such faults. Mr. Seward Brice has done a great service to the cause of Comparative Jurisprudence by his new recension of what was from the first a unique text-book on the Law of Corporations. He has gone far towards effecting a Digest of that Law in its relation to the Doctrine of *Ultra Vires*, and the second edition of his most careful and comprehensive work may be commended with equal confidence to the English, the American, and the Colonial Practitioner, as well as to the Scientific Jurist.

Annuaire de l'Institut de Droit International. Première Année. Gand, Bureau de la Revue de Droit International, Rue de l'Université. 1877.

This handsome little volume, edited by the indefatigable General Secretary of the Institute of International Law, contains much that cannot fail to be of interest in the present aspect of Europe. Besides the Minutes of the Session of 1875 at The Hague, and a good account of work distributed among the Members since that meeting, M. Rolin-Jaequemyns has given a sketch of the origin of the Institute, of its Foundation Conference at Ghent, in September, 1873, and of its Geneva Session in 1874. The most original feature of the work is Part III., which consists of a careful Chronological List of the principal events connected with Legislation or Diplomacy throughout the civilised world from January, 1874, to July, 1875.

Part IV. contains a useful selection of the most important International documents, Treaties, Conventions, &c., between the same dates, and the volume concludes with the first instalment of a Bibliography of Works bearing on International Law, published within the same period. It is to be hoped that M. Rolin-Jaequemyns will not find that he has overtaxed his strength in attempting to compress so much information within

so narrow a compass, in addition to his already heavy labours in his secretarial and editorial capacities.

Commentaries on the Liberty of the Subject and the Laws of England Relating to the Security of the Person. By JAMES PATERSON, M.A., Barrister-at-Law. Macmillan & Co. 1877.

We have here a remarkable work. It combines the merit of being at once scientifically legal and philosophical. It discusses the reasons on which Laws were founded, and supplies the authorities on which their administration is now, day by day, conducted. The most ancient writers are summoned to tell us why Legislation, even in its crudest form, took a particular course; the most recent Reports explain to us what have been and are the constructions put upon the oldest decisions and the latest Statutes. The Law has long required some such book, and it is to be hoped that it will be followed by others of a similar character. With the exception of Blackstone's immortal Commentaries, there never yet has been a work which attempted to philosophise upon the principles of, and at the same time to report with accuracy the decisions upon, the Law. The author of the present work has attempted this much-desired labour, and has achieved a considerable measure of success in the attempt. One leading principle, not much considered by legal writers in general, he affirms with distinctness—that is, that the great characteristic of Positive Law is negative. Men are told not what they shall do, but what they shall not do. When Law is called the “rule of conduct,” the phrase is a misdescription. Law would be much more truly described as the prohibition of misconduct. All individual men are supposed to have natural tendencies to self-indulgence, which, for the purposes of the Common Good, must be in the individual repressed. The most ancient and one of the most revered of Law-givers, Moses, in the Ten Commandments, has but one in the positive form. All the others are negative or prohibitory; and all legislators since his time have followed the precedent of their grand original.

This is the first great principle asserted and well worked out in Mr. Paterson's book. But the applications of it are, as may be supposed, multitudinous. A work on “The Liberty of the Subject, and the Security of the Person” could not fail, in this free country, to be almost prodigal in illustrations. Both matters have been the earnest objects of popular desire and of

legislative labour from the earliest times of England. In other countries the Liberty of the Subject has been an object of little consideration with Governments; here it was always deemed one of high importance, and, though clever and daring despots again and again ventured to treat it with disregard, they almost always had to suffer from a pursuing Nemesis which left, at least, something like a suggestive warning to a wilful successor. As to the Security of the Person (in matters with which the Liberty of the Subject was not concerned), there was, anciently, a degree of anxiety manifested by Law and Lawyers, which is not, unhappily for the security of the weak and defenceless, quite so strongly manifested at the present day. The continual exhibition of a violent and vindictive temper would not in former times have been accepted as a proof of insanity that ought to relieve a criminal from suffering the extreme penalty of the law, but rather as an evidence that he was properly the object of its exercise. But men constitute nations—men change, and therefore nations change. Whereas at one time there was almost a relentless pursuit of a person supposed to be a murderer, and a very unhesitating punishment of him, together with an unsparing treatment of his body afterwards (as the author fully explains in the 8th Chapter), now a clever *ex parte* statement, skilfully presented, frequently saves an undoubted criminal from the just penalty of the Law.

Although we cannot agree with all Mr. Paterson's conclusions, some of which seem not entirely free from the influence of crotchets, his work undoubtedly possesses merit of a high class, and is well worthy the study of the Philosopher and the Lawyer.

An Analysis of M. Ortolan's Institutes of Justinian; including the History and Generalisation of Roman Law. By T. LAMBERT MEARS, M.A., LL.D. (Lond.), of the Inner Temple, Barrister-at-Law. Stevens & Sons. 1876.

We fear that much obscurity yet clouds the understanding of Roman Law in England, and of the position which it must hold in any attempt at giving a scientific legal education. Whatever may come of the efforts repeatedly made by Lord Selborne to establish a Legal University, or of the not very dissimilar views which the Lord Chancellor has lately expressed regarding the systematic course of higher education in Jurisprudence which he is desirous of seeing carried out, the study of the works of the

Masters of Jurisprudence for all time cannot but be increased and deepened. Any work, therefore, which shall help the student on his way, and set before him in a handy volume the pith of the labours of an eminent commentator on the Roman Law, is smoothing the road for an improved system of legal education, and this meed of praise is Dr. Mears's due for the book now before us.

In the execution of his good purpose, we think Dr. Mears has not escaped some errors. His retention of the original numbers of the paragraphs translated, which are but excerpts with gaps between, is more likely, we believe, to confuse than to assist the student. A candidate for honours should not content himself with an abridged translation, which, at the best, can be only the dry bones of the original. A Pass-man, on the other hand, does not need to know what paragraphs have been omitted, for there is little hope that he would refer to M. Ortolan's own luminous pages. Dr. Mears hopes, indeed, that this arrangement may enable the Index of his work to serve for the original also, but this it can only do in part. Would it not be possible for him to make a complete Index to M. Ortolan's "Explication Historique" a feature in his promised Translation of the Institutes of Justinian and Gaius? There are some occasional crudities in Dr. Mears's translation, and we do not understand why he should write *André Alciat* and *James Cujas* in the course of the same paragraph. We should recommend him, in a future Edition, to place the abstracts where a student would naturally look for them—before the Book of the Institutes to which they relate, and not after it. Even without such improvements as we have suggested, Dr. Mears' abridgement of Ortolan's Roman Law will prove a valuable aid to the student.

A Concise Treatise on the Construction of Wills. By H. S. THEOBALD, of the Inner Temple, Esq., Barrister-at-Law, and Fellow of Wadham College, Oxford. Stevens & Sons. 1876.

There has long been need of a really good and systematic Treatise on Wills, which, while satisfying the ordinary requirements of the practitioner, should at the same time afford the student a comprehensive and yet concise exposition of Testamentary Jurisprudence. Such a Treatise would occupy, in fact, an equi-distant position between the amplitude of Jarman's learned work, and the paucity of detail inherent in the plan of Mr. Vaughan Hawkins's valuable book. Mr. Theobald fairly admits

his obligations to both these works, without the former of which, his own, he says, "would probably never have been written;" while the general scheme of the latter has served in the main as the model of the book before us. We may still retain a predilection in favour of these older and tried guides; but Mr. Theobald has certainly given evidence of extensive investigation, conscientious labour, and clear exposition. His subject is one of great importance and as great intricacy. Testators often unconsciously invite litigation, and Mr. Theobald has done good service in drawing up a short chapter of "Suggestions for Preparing a Will," which deserves careful perusal. Taken as a whole, this is a more useful work for the Student than either of the older books on Wills. It is not so strictly scientific in its arrangement as Mr. Vaughan Hawkins's Treatise, but for that very reason, perhaps, is better adapted to the Student. Mr. Theobald works his cases into his text, instead of laying down a Rule, and then giving the cases on which it is founded. He insists strongly on the frequently superficial character of the resemblance of one case to another, and attributes to the weariness induced by the citation of irrelevant cases the fact that Judges have "sometimes gone so far as to object to the citation of cases upon the Construction of Wills altogether." This result is hardly to be wondered at. Mr. Theobald appears to wish for the solution of the problem how Wills are to be construed when questions arise, by the adoption of a golden mean between the assumption of a "hard and fast Rule of Construction" (such, *e.g.*, as has arisen out of Lord Romilly's Rules in *Edwards v. Edwards*), and the leaving of the Construction of a Will entirely to the discretion of an individual Judge, "unfettered by precedent or authority."

The somewhat large list of Corrigenda in Mr. Theobald's book, though containing the serious erratum of "illegitimate" for "legitimate," does not comprise another equally serious one on page 4, where the author, in reciting a portion of the Wills Act, 1837, printed correctly in his Appendix, makes his quotation unintelligible through an important omission. There is a very full table of cases, which adds to the practical utility of Mr. Theobald's book.

A Treatise on the Statute of Frauds. By WILLIAM FISCHER AGNEW, of Lincoln's Inn, Barrister-at-law. Wildy and Sons. 1876.

Awaiting the settlement of the vexed and difficult question as to the possibility of reducing our vast and complicated mass of

statutes and legal decisions into a simple and intelligible form, by either Code or Digest, the race of text books continues to multiply exceedingly, and, like the Egyptian locusts of old, gradually to cover and appropriate the whole territory of legal principle and practice. We congratulate Mr. Agnew on having discovered a little nook of virgin soil, luxuriant with a most tangled growth of legal decisions.

Of course the Statute of Frauds has frequently been referred to and treated of in numerous legal works, and the decisions interpreting its various sections have been incidentally examined as they bore upon the particular class of questions treated of in each work; but it is remarkable, having regard to its importance and wide application, that this Statute should not hitherto, so far as we know, have been selected as the subject matter of a separate treatise.

Mr. Agnew's treatise has considerable merit. He has evidently expended much industry and care in collecting and examining the numerous decisions bearing upon his subject; he has not contented himself with stringing together a number of headings or marginal notes, but he gives the effect of the cases he cites in a clear and intelligible manner, and he appears to us generally to state the principles he wishes to deduce therefrom with accuracy and discernment. The insertion of fresh cases has been continued to a late period before publication, so that "he who runs may read" in this book the latest state of the law upon the subject.

But one thing which we must complain of is that we have to "run" to and fro if we wish to read. If it be asked what is Mr. Agnew's method of arrangement, we are tempted to say he has no method of arrangement. The titles of his different chapters might have been written on folded slips of paper and put into a hat, and, after being shuffled, arranged in the order in which they were drawn out. Chapter VIII. treats of the general rules of law with regard to the execution and attestation of wills; Chapter X. treats of exceptional modes of execution and attestation recognised as valid in the case of soldiers and sailors. Why are they separated by Chapter IX. on revocation of wills? And why is another chapter relating to wills separated from its brethren by the intervention of four other chapters on totally different subjects? We venture to think that this is a serious defect, and one which detracts much from the value of the book for purposes of study, and somewhat also from its usefulness to the practitioner. We also think that this book

might have been improved by a more careful final revision before sending it to the press, whereby several noticeable instances of want of completeness and clearness of explanation might have been omitted. For instance, the statement of the effect of the Real Property Amendment Act, 1845, at the top of p. 13, is to us utterly unintelligible. Again, there is apparent inconsistency between the words of Vaughan, C.J., cited at p. 7, and Mr. Agnew's statement at p. 9, "that a simple license, in order to be binding on the licensor, must be under seal." We will not refer to other instances of incompleteness of revision; they are, indeed, only occasional, but they would have been better avoided.

On the whole, however, the book before us shows much learning and industry, and is likely to be a useful addition to a Lawyer's library.

SMALLER BOOKS AND PAMPHLETS.

The Chichele Professor of International Law and Diplomacy in the University of Oxford, Dr. T. Erskine Holland, in his *Lecture on the Brussels Conference of 1874* (Oxford and London, James Parker & Co., 1876), treats within a very small compass a subject which the existing position of the European Commonwealth renders peculiarly interesting. It was a matter of complaint during the late Servo-Turkish campaigns that the Geneva Convention was not properly observed by the Ottoman troops, and even that its symbol, probably owing to its religious connotation, was disregarded and insulted. This is only one of the many points connected with Diplomatic and quasi-Diplomatic attempts to mitigate the rigour of warfare, on which Dr. Holland's suggestive pamphlet may be consulted with advantage.—The author of *England's Maritime Rights* (Hardwicke & Bogue), Mr. Ross of Bladensburg, is a military officer, zealous for what he conceives to be his country's good, in case of a European conflict, and that is, in his opinion, the formal withdrawal of Great Britain from the Declaration of Paris, 1856. Mr. Ross argues his case with great vigour, and it will not be his fault if Parliament should not, in some Session yet to come, sanction the reversal of the Acts of 1856, and thus restore that "balance of power" between the maritime and military Powers which was then, in his view, unduly disturbed.—Dr. James Bryce, who modestly hides all his titular distinctions, save those

of Barrister-at-Law and Fellow of Oriel, has brought out, as a Supplement to Ludlow and Jenkyns on the Law of Trade Marks, a useful edition of the *Trade Marks Registration Acts*, 1875-6 (William Maxwell & Son, 1877), with the pertinent Rules and Instructions, prefaced by an Introduction, and accompanied by a running Commentary of notes. But would it not have been an improvement if the learned Professor had printed the portions of the Act of 1875 which were repealed by that of 1876, within square brackets, and had intercalated the Amendment Act, which is very short, in the principal Act? Still, it would be difficult to go wrong in the process of registering a Trade Mark with Dr. Bryce's book at one's elbow.—In the *Articled Clerks' Hand-Book* (Stevens & Sons, 1877), Messrs. Rubinstein and Ward have accomplished a work which must prove a boon to the class interested. All that it is necessary to learn respecting the Law regulating the status of a clerk under articles, and regarding the various Examinations, seems to be brought together by the authors within a convenient compass and in clear language.—In *Observations on the Object and Effect of Section 38 of the Companies Act, 1867* (Stevens & Sons, 1877), the author, a Solicitor of long practice in cases under the Act, draws attention to various questions which have recently derived additional importance from *Twyecross v. Grant*, and other cases of less note.—In *Lithotomy, its Successes and its Dangers* (Melbourne, F. & F. Bailliere, 1876), attention is drawn to points of interest in connection with Medical Jurisprudence, and it would seem that Coroners' Inquests require some reform at the Antipodes no less than in England.—From a different quarter of the globe, there reaches us a reflux of International Legal Literature, in the shape of a *Series of Essays on Legal Topics* (Philadelphia, Rees Welsh, 1876), by Jas. Parsons, Esq., Professor in the Law Department of the University of Pennsylvania, most of which appeared in the pages of the "Law Magazine and Review" at various periods between 1863 and 1871; while the last in the Series, which, under the title of "The Ancient Commonwealth," enters vividly into the world of the "Cité Antique" of M. Fustel de Coulanges, is reprinted from the American Law Register.—Mr. Guernsey, of the New York Bar, whose Key to Equity Jurisprudence we have already noticed, has reprinted (New York, McDivitt, Campbell & Co.), from the "Archives of Electrology and Neurology" for 1874, a Paper on "Municipal Law and its Relations to the Constitution of Man," in which he appears to hold the view that it is

only owing to an inherent infirmity of the flesh that man stands in need of Law and Religion. We cannot help thinking that he was somewhat hampered by the special title of his paper, and that it should have been devoted to "Law" without the qualifying adjective.—A writer who, oddly enough, calls himself "*fustum*," and adopts "*Fiat Justitia, ruat calum*" as his motto, takes us to the Celestial Empire in his *Two Episodes of Recent Anglo-Chinese History* (James Bain, 1877), in which, by the instances of the Woosung Railway and the Ocean Case, he seems to wish to prove that English Policy in relation to China has been altogether wrong, and that of the Brother of the Sun and Moon, and his Mandarins, altogether right and commendable. "*Fiat Justitia*," when the Gods have decided where the right lies.—The useful work of the "*Revised Edition of the Statutes*" (Vol. xi., Eyre & Spottiswoode, 1877), is continued in the last issue down to the effect of Repeals made as late as the close of the Session of 1876, and extends over the Acts of the three Sessions, covering the years 1851-53. A Table, in a separate form, is given with it, showing the extent of the Repeals contained in the previous ten volumes of this indispensable adjunct to the Practitioner's Library.

Books Received.

We have to acknowledge the receipt of the following :—

- Bullin's Examination Guide and Introduction to the Law.* Stevens & Sons. 1876.
- Blunt & Phillimore's Book of Church Law.* Rivingtons. 1876.
- U.S.A. Report on Public Libraries, Bureau of Education.* Washington. 1876.
- Hugh's Law of Receivers.* Chicago: Callaghan. (London: Trübner.) 1876.
- Roberts's Principles of Equity.* Butterworths. 1876.
- Pollock's Digest of the Law of Partnership.* Stevens & Sons. 1877.
- Ewell's Law of Fixtures.* Chicago: Callaghan. (London: Trübner.) 1876.
- Goddard's Law of Easements.* Stevens & Sons. 1877.
- Willis Bund's Oke's Game Laws.* Butterworths. 1877.

- Bishop's Criminal Law.* Sixth Edition, 2 vols. Boston: Little, Brown & Co. (London: Sampson, Low & Co.) 1877.
- Scarlett's Memoir of Lord Abinger.* John Murray. 1877.
- Amos's Laws for the Regulation of Vice.* Stevens & Sons. 1877.
- Code d'Instruction Criminelle Autrichien.* Société de Législation Comparée. 1875.
- Annuaire de la Société de Législation Comparée.* Paris: Cotillon. 1876.
- Le Droit Coutumier des Slaves Méridionaux.* Paris: E. Thorin. 1877.
- Etudes sur les Loix de Finance (Angl. et Etats Unis).* Par G. Louis. Paris: Cotillon. 1877.
- Ueber die Todes-strafe.* Vortrag von Herrn Prof. Benedikt. Wien. 1877.
- Boletin de la Institucion Libre de Ensenanza.* Madrid: 1877.

We have also received to date:—

- The American Law Review.* Boston: Little, Brown & Co.
- The Southern Law Review.* St. Louis: G. I. Jones & Co.
- The Albany Law Journal.* Albany, N.Y.
- The Canada Law Journal.* Toronto.
- The Scottish Law Magazine.* Edinburgh: T. & T. Clark.
- The Irish Law Times.* Dublin.
- The New Zealand Jurist.* Dunedin, N.Z.
- Journal de Droit International Privé.* Nos. I., II. Paris: Marchal, Billard, et Cie. 1877.
- Revue de Droit International.* Gand. No. III. 1876-7.
- Rivista di Discipline Carcerarie.* Rome: Jan.-March, 1877.
- Revue Générale du Droit, &c.* Paris: E. Thorin. No. II. April. 1877.

Legal Obituary of the Quarter.

January.

30. HAYTER, Thomas, Esq., Solicitor, aged 44. Adm. 1854.

February.

I. COLLINS, John Stratford, of Gray's Inn, Esq., Barrister-at-law, B.A., Trin. Hall, Cam., aged 62. Called 1848. J.P. and D.L. for Co. Hereford.

„ MASON, Thomas Johnson, Esq., Solicitor, Louth, Lincolnshire, aged 36. Admitted 1863.

2. MACNAMARA, Henry Tyrwhitt Jones, of Lincoln's Inn, Esq., Barrister-at-law, one of Her Majesty's Railway Commissioners, aged 57. Called 1849.

„ MAGRATH, William, Esq., Solicitor (Irel.)

3. PALMER, Charles Edmund, of the Inner Temple, Esq., Barrister-at-law, aged 39. Called 1864. Grandson, maternally, of the late Sir John Wilde, LL.D., brother of the first Lord Truro, Lord Chancellor.

5. LYON, Andrew, of Lincoln's Inn, Esq., Barrister-at-law, M.A., Judge and Sessions Judge of Ratnaghiri, Bombay Presidency. Called 1875.

6. WHITAKER, Edward Thomas, Esq., Solicitor, aged 76. Admitted 1823.

7. SHARPLEY, Arthur Edwin, of the Middle Temple, Esq., Barrister-at-law, LL.D., Advocate of the High Court, Allahabad, aged 45. Called 1869.

10. ANDREWS, Thomas Bishop, Esq., Solicitor (Scot.), at Kilmarnock, aged 45.

11. WHITWORTH, Robert, of the Inner Temple, Esq., Barrister-at-law, M.A., Clare Coll., Cam., aged 63. Called 1837.

12. KELLY, Fitzroy, of Lincoln's Inn, Esq., Barrister-at-law, B.A., Trin. Coll., Cam. Called 1858.

„ HAWETT, Thomas, Esq., Solicitor, Wigan, Lancashire, aged 35. Admitted 1865.

13. COBBETT, John Morgan, of Lincoln's Inn, Esq., Barrister-at-law, M.P. for Oldham, aged 77. Called 1830. Second son of the famous William Cobbett, formerly M.P. for Oldham. Chairman of Quarter Sessions for the West Division of Sussex.

„ O'DONOGHUE, John, Esq., Barrister-at-law (Irel.), late Assistant Poor Law Commissioner, aged 80.

14. MITCHELL, Thomas Davis, of the Inner Temple, Esq., Barrister-at-law. Called 1868.

15. SAUNDERS, George Williams, of Lincoln's Inn, Esq., Barrister-at-law, aged 80, late a Commissioner of Her Majesty's Court of Bankruptcy. Called 1820.

17. REYNOLDS, Alfred C., Esq., Solicitor (Irel.)

„ STRATFORD, Thomas, Esq., Solicitor (Irel.), aged 68.

20. KEILY, George, Esq., Solicitor (Irel.)

21. CLOWES, John, Esq., Solicitor, Great Yarmouth, aged 68. Admitted 1832.

22. CATHCART, Elias, Esq., of Auchendrane, Advocate, LL.D., Leyden, aged 84. Called 1817. J.P. for Fife, and D.L. for Ayrshire. His father was Lord Alloway of the Court of Session.

„ GIFFORD, Alexander, Esq., S.S.C. (Scot.), aged 87. Admitted 1815. Uncle of the present Lord Gifford, of the Court of Session.

„ RAIMONDI, Charles Henry, Esq., Solicitor, aged 38. Admitted 1871.

27. BRAIKENRIDGE, Francis Jerdone, Esq., Solicitor, aged 54. Admitted 1847.

„ DIXON, Arthur, of Lincoln's Inn, Esq., Barrister-at-law, aged 37. Called 1861.

„ LANYON, Charles Mortimer, of the Inner Temple, Esq., Barrister-at-law, B.A., Trin. Coll., Oxon., aged 36. Called 1865.

28. LOVEDAY, Arthur, Esq., Proctor and Notary, aged 81. Admitted 1815.

March.

2. POLLOCK, Edward, Esq., Solicitor (Irel.), aged 61.

4. HALLETT, Thomas Perham Luxmoore, of Lincoln's Inn, Esq., Barrister-at-law, LL.B., formerly Fellow of Trin. Hall, Cam., aged 75. Called 1829. A descendant (through his mother Jessey, daughter and co-heiress of the late Thomas Perham, Esq., of Well Court, Dorset) of Sir William Perham or Periam, Lord Chief Baron of the Exchequer in the reign of Queen Elizabeth.

7. BERWICK, Edward, Esq., A.M., Barrister-at-law (Irel.), President of the Queen's College, Galway.

8. BARLOW, Arthur, Esq., Solicitor (Irel.), aged 79.

9. HEWITT, Thomas Sidney, Esq., Solicitor, aged 83.

9. PATTEN, John, Esq., W.S. (Scot.), aged 71.

10. PLOWDEN, Harry A. Chichele, of the Middle Temple, Esq., Barrister-at-law, late Captain, Bengal Staff Corps, aged 37. Called 1876.

13. HERON, John Rippon, Esq., Solicitor, aged 43. Admitted 1858.

„ JEFFEREYS, John, of Lincoln's Inn, Esq., Barrister-at-law, aged 68. Called 1835.

15. NORTON, William, of the Middle Temple, Esq., Barrister-at-law, aged 31. Called 1870.

17. CLARK, Thomas James, Esq., Q.C., and a Bencher of the Inner Temple, aged 55.

„ MITCHELL, Thomas, Esq., Solicitor (Irel.), aged 69.

21. HENN, William Poole, Esq., Solicitor (Irel.)

22. GOVER, Henry, of the Inner Temple, Esq., Barrister-at-law, LL.D., St. Peter's Coll., Cam., aged 50. Called 1856.

„ HANSON, Edward Pardoe Cotton, of Lincoln's Inn, Esq., Barrister-at-law, aged 43. Called 1856.

„ HAWKINS, John, Esq., Solicitor, Hitchin, aged 86. Admitted 1813. Father of Sir Henry Hawkins, Judge of the Exchequer Division of the High Court of Justice.

23. DUNDAS, Sir David, Bart., F.R.S., F.S.A., Advocate, aged 74. Called 1824. Only son of the late Sir Robert Dundas, Bart., of Beechwood, Midlothian, a Principal Clerk of Session, by Matilda, daughter of the late Hon. Archibald Cockburn, one of the Barons of the Court of Exchequer in Scotland. The title devolves upon his eldest surviving son, Sidney James, born in 1849.

„ FERGUSON, John G., Esq., Solicitor (Irel.)

„ MERRIMAN, William Clark, Esq., Solicitor, Marlborough, Registrar of the County Court, aged 73. Admitted 1827.

24. RYLAND, Arthur, Esq., Solicitor, Birmingham, J.P. for Worcestershire, aged 70. Admitted 1828.

„ BAGEHOT, Walter, of Lincoln's Inn, Esq., Barrister-at-law. Called 1852.

24. CROWDY, James, Esq., Solicitor, aged 57. Admitted 1841.

26. IRWIN, Hugh, Esq., Solicitor (Irel.), late Chief Registrar, Civil Bill Court, Dublin, aged 73.

28. O'BEIRNE, Henry, Esq., Solicitor (Irel.)

29. DUNDAS, Right Hon. Sir David, M.A., Q.C., and a Bencher of the Inner Temple, aged 78. Eldest surviving son of the late James Dundas, Esq., of Ochertyre, Co. Perth. Educated at Westminster School, and subsequently Student of Ch. Ch., Oxford. Called to the Bar 1823; Q.C. in 1840, and Liberal M.P. for Sutherlandshire till 1852, and again, 1861-67. Solicitor-General under Lord John Russell's Administration 1846-8; Judge Advocate-General 1849-52.

„ RIDDELL-WEBSTER, Thomas Wyllie, Esq., Advocate (Scot.), aged 70.

31. COOKE, John William, Esq., Barrister-at-law (Irel.), J.P., aged 58.

April.

1. BEHAN, John, Esq., Barrister-at-law (Irel.), aged 46.

2. SHUGAR, John Merritt, Esq., Solicitor, Tring, aged 54. Admitted 1844.

5. STOATE, William, of Gray's Inn, Esq., Barrister-at-law. Called 1847.

8. FALLS, Henry, Esq., Solicitor (Irel.)

„ SHAW, Benjamin, of Lincoln's Inn, Esq., Barrister-at-Law, formerly Fellow of Trin. Coll. Cam., aged 58. Called 1868, having previously for some years practised below the bar.

„ SYMONDS, Arthur, of the Middle Temple, Esq., Barrister-at-law, aged 70. Called 1841.

9. TILSON, Sir Thomas, Kt., J.P. and D.L. for Surrey, and Chairman of Quarter Sessions, aged 74. Formerly a Solicitor in London.

14. REYNOLDS, Edward, of the Inner Temple, Esq., Barrister-at-Law, B.A., Lincoln Coll. Oxon., aged 35. Called 1864.

14. SCOTT, Montagu, Esq., Solicitor, aged 55. Admitted 1845.

„ TOMLIN, George Taddy, of the Inner Temple, Esq., Barrister-at-Law, J.P. for Kent, aged 51. Called 1855.

19. SMITH, Thomas Henry, Esq., Solicitor, aged 66. Admitted 1857.

20. FRY, Alfred Augustus, of Lincoln's Inn, Esq., Barrister-at-Law, aged 64. Called 1835.

THE LATE DR. GEORGE MATCHAM.

He was the eldest son of George Matcham, Esq., of Ashfold Lodge, Sussex (of whom an excellent account is given in the "Gentleman's Magazine" for 1833), by Catherine, youngest daughter of the Rev. Edmund Nelson, Rector of Burnham Thorp, Norfolk, by Catherine Suckling, great-niece of Sir Robert Walpole, K.B. To Mrs. Matcham's male issue, after the male descendants of her eldest sister, Mrs. Bolton, the title and estates of Nelson are limited.

The "Salisbury and Winchester Journal" of 20th January, 1877, correctly states that the subject of this notice "was born in 1789, and was educated at St. John's College, Cambridge, where he took the degree of LL.B. in 1814, and that of LL.D. in 1820. In the same year he was admitted an Advocate in Doctors' Commons. In 1836 he succeeded the late Earl of Radnor as Chairman of the Wilts Quarter Sessions, held in the city of Sarum, an office which he continued to hold down to April, 1867, when he received a vote of thanks from the Magistrates assembled in Quarter Sessions for his courteous and upright conduct as Chairman for a period of thirty years. He brought," continues the writer of that notice, "to the discharge of his duties a profound knowledge of the Law, and dispensed Justice in the most impartial manner. His decisions were given without the slightest exhibition of temper, and were the result of impartiality and investigation. Mr. Matcham was from an early period addicted to antiquarian pursuits; and when Sir Richard Colt Hoare undertook the publication of the

'Modern History of Wilts,' he contributed those portions of the work which are devoted to the Hundreds of Downton and Frustfield."

Mr. Matcham's reminiscences went back to the beginning of this century. He could relate how that in 1805, being then about 16 years of age, he was the guest of his uncle, Lord Nelson, at Merton, and listened to the conversation of men very eminent at that period in war and in politics. He heard Lord Nelson, when relating the last interview he ever had with Mr. Pitt, say, "Mr. Pitt paid me a compliment which I believe he would not have paid to a Prince of the Blood, he left the room with me, and attended me to the carriage." And, finally, Mr. Matcham witnessed the departure of the great Admiral to the achievement of his crowning victory at Trafalgar.

Later in life he was an Advocate frequenting the Courts presided over by Lord Stowell, whose acquaintance he was honoured with, and whose hospitality he enjoyed. A sound scholar himself he could fully appreciate the conversation of that remarkable man, and he has given some anecdotes of him in the "Gentleman's Magazine," signed Wiltonensis.

In 1825, as a coadjutor of Sir Richard Hoare, in his History of Wilts, he commenced a series of visits to that venerable baronet, at Stourhead, where Lord Arundell of Wardour, Mr. Rokewode Gage, Mr. Robert Benson, and other accomplished antiquaries were accustomed once a year to assemble.

Ripe in years, and honoured and revered by all his relatives and friends, with a vigorous mind, unimpaired to the last, he passed away on the 18th January last, leaving a character, almost peculiar to our nation, of an accomplished, an able, and useful country gentleman.

Mr. Matcham married, 1817, Harriet, eldest daughter and heiress of Mr. William Eyre, of Newhouse. She was the representative of the Newhouse branch of that ancient

family in Wilts, and was a descendant of Chief Justice Eyre. With this lady, whom he survived, he lived in affectionate union for fifty-four years. He leaves a son and two daughters.

THE LAW MAGAZINE AND REVIEW.

No. CCXXV.—AUGUST, 1877.

ART. I.—CURIOSITIES OF ENGLISH LAW.

NO. II.—CONDITIONS IN RESTRAINT OF MARRIAGE.

WE now propose to review a branch of the Law which, if it were on no other account open to comment, would be abundantly worthy of notice as having given rise to a most remarkable Rule of Construction.

This Rule of Construction, commonly known as the Doctrine of Conditions *in terrorem*, may be shortly stated as follows:—Where a testator attaches to his bounty a condition of forfeiture on marriage, the Court often refuses to construe his words according to their natural meaning, and holds that he did not really intend the threatened forfeiture to take effect, but only inserted the condition in the hope that the legatee by taking an erroneous view of his intentions might be intimidated into remaining single.

We believe no one has succeeded in discovering when this doctrine which traces its origin to the Civil Law first became naturalized in this country. Like the family of Douglas, there never seems to have been a time when it did not flourish. We never come across it in an embryo state; on the very first introduction we are presented to it in a high stage of development as an incontestible dogma. Yet so long ago as the leading case of *Scott v. Tyler*, it was spoken of very disrespectfully both by the Judge and by some of

the principal counsel of the day, and since that time its position has by no means improved.

It is no doubt a matter of congratulation that the Judges have, in this instance, been content simply to perpetuate a time-honoured doctrine which has been universally condemned for a century, and have not thought it necessary (as is often the case) to add to the sanction of antiquity the weight of their own approbation. The vigorous assaults on the part of the highest functionaries of the Law to which this devoted doctrine has been subjected, certainly affords a gratifying spectacle of judicial independence. Lord Thurlow in *Scott v. Tyler*, after referring to some early cases, observes, "I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen,"* and for a modern exposition of judicial opinion on the doctrine, it will be sufficient to refer to the judgment of Jessel, M.R., in *Bellairs v. Bellairs* (L.R. 18, Eq. 510), in which he follows the current of authority with extreme reluctance. Satisfactory as it is to find that the undisguised opinion of the Judges is in this instance not opposed to the plain dictates of common sense, we may well feel some little disappointment when we reflect that a doctrine, on the face of it utterly absurd, which has been energetically condemned by the highest legal authority nearly a century ago, should still be permitted to flourish in undiminished vigour. The vitality of legal abuses must indeed be great, if such a one as this can escape the raid of Law Reformers uninjured. Without a friend in the world, planted no one knows how or why, it exists simply because it has existed. Possibly like the reed in the fable, its very weakness constitutes its strength. There is, it may be, a kind of chivalrous feeling in the breasts of Law Reformers, impelling them "*parcere subjectis et debellare superbos*," that is, to spare the small game,

* See also the observations of Lord Mansfield, in *Long v. Dennis*, 4 Burr 2055.

and direct their attacks at those large and terrible abuses which have influential defenders and die hard. We know that the satisfaction arising from the successful issue of an enterprise, depends principally upon a sense of the difficulties which have had to be surmounted, and we can quite understand that the feeling of triumph, to say nothing of an increased meed of popular applause, occasioned by a hotly-contested victory, affords a much keener source of gratification to the victor than the discomfiture of a feeble enemy.

A rat-catcher may be more usefully employed than a lion-hunter, but his occupation is not held in the same estimation. In this respect, the Law Reformer is no exception to the general rule. He feels as keen a delight as any other naturally combative person in meeting "a foeman worthy of his steel" To fight the powers that be, to try a fall with the Attorney and Solicitor-General, to brave the invectives of the Lord Chancellor, and the contemptuous sneers of the senior members of the Bar—this is indeed an inspiring contest, defeat is no dishonour, and victory inexpressibly glorious. How humble in comparison is the position of the mere Scavenger of Reform, he who quietly removes a nuisance the retention of which is a matter of indifference to the highest legal authorities. Too many of us aim rather at being famous than useful, and hence we can understand how it happens that an abuse may owe its vitality to the mere fact that it is too utterly rotten for any human being to defend, and we venture to think that no better illustration of the truth of this paradox can be found than in the continued existence of the Doctrine of Conditions *in terrorem*.

Having once firmly established the doctrine that persons are in the habit of endeavouring to regulate the conduct of their legatees by purporting to impose penalties which they do not intend to be enforced, and which those legatees may discover from the nearest attorney to be a mere dead letter, it may be a question whether the judges might not, with advantage, have abandoned altogether the transparent

pretext of trying to discover the real intention of the testator. The solution they arrived at as to the meaning of the testator's words being, in most cases, obviously opposed to common sense, one would scarcely have thought it worth their while by refining on their canons of construction to render that solution more difficult to forecast. However, various refinements have, as we all know, been engrafted on the primitive doctrine until the decisions of the Court have become extremely difficult to forecast. First a distinction has been taken between those cases in which a testator has merely declared that an interest given to a person shall cease on marriage, without any direction as to the disposition of the fund in that event, and those cases in which there is an express bequest over of the forfeited interest. The judicial mind has been much exercised as to the ground of this distinction. Sir William Grant, M.R., in *Lloyd v. Branton* (3 Mer. 117), observed, "Different reasons have been assigned by different Judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of the forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said that it was the interest of the devisee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect."

We do not propose to comment on the judicial doubts as to this knotty point; it will be sufficient to observe that the distinction in question, whatever may be its origin, or on whatever grounds it may be upheld, has, in its application, given rise to a good deal of litigation, owing to a difference of opinion among the Judges as to whether or not a residuary bequest amounts to a sufficient bequest over to oust the *in terrorem* doctrine. Sir William Grant in the last-mentioned case, without venturing to give a positive

opinion as to the effect of a simple residuary bequest, decided that a direction that the forfeited bequests should fall into the residue was as effectual as an express bequest over, and although the better opinion would seem to be that a simple residuary bequest does not amount to a bequest over, the point can hardly be said to be free from doubt.

We see then that the first limitation placed to the doctrine of conditions *in terrorem* has given rise to a doubt that is still *sub judice*.

The effect of an alternative bequest has also furnished abundant matter for controversy. If the Judges had been actuated by any *bonâ fide* desire to carry the wishes of testators into effect, it is difficult to see on what ground they should have refused to an alternative bequest the same weight as an indication of intention which they accorded to a bequest over. If a man is held to have sufficiently expressed an intention to enforce the threatened terrors of forfeiture by indicating the objects of his bounty in the event of the forfeiture taking effect, surely his intention not to rely upon any idle threat remains equally manifest if he takes the trouble to make out an alternative scheme, and, instead of naming other objects of his bounty, proceeds to apportion the relative wages of obedience and contumacy. However, it was settled by Lord Hardwicke (*Wheeler v. Bingham*, 3 Atk. 364), that an alternative provision in the event of non-compliance with the conditions of celibacy, on which the original bequest was granted, whether such alternative provision was settled by the testator himself, or left to the discretion of others, was not sufficient to oust the doctrine of *in terrorem*. But although the authority of that decision has, we believe, never been questioned, nevertheless it would be wrong to infer that the insertion of an alternative bequest may be left out of consideration in determining the effect to be attributed to a clause of forfeiture. Such a bequest may produce, in

a different way, precisely the same effect, as regards the threatened legatee, as a bequest over may. Sometimes it will be efficacious to his detriment when a bequest over would have been innocuous, for the tendency of modern decisions has been to consider alternative bequests in the light of *limitations* (which are valid even when in *general* restraint of marriage) rather than conditions. The cases on this head (which contain extremely thin distinctions, and are very difficult to reconcile) we will refrain from discussing until we come to consider the question of limitations as distinguished from conditions.

We have said quite enough to show that the *in terrorem* doctrine has occasioned a great deal of doubt and difficulty, but the most perplexing question of all in relation to that doctrine has still to be investigated, namely, whether the doctrine does or does not apply to conditions precedent. In the first place, it is sometimes by no means an easy matter to distinguish a condition precedent from a condition subsequent. We find it stated in a very early case (*Robinson v. Comyns*, Ca. Temp. Talbot, 166), that "There are no technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either, according to the intent of the person who creates it." After this not very encouraging announcement, it is not surprising to find that a large proportion of the cases on Conditions in Restraint of Marriage, contain more or less elaborate arguments, with the object of showing that what would appear *primâ facie* to be a condition precedent, is really a condition subsequent, and *vice versa*. At first sight, the distinction between the two classes of condition seems both simple and substantial. The one class, we are told, operates by way of raising an interest, the other by adeeming a benefit already conferred. In practice, however, it was soon discovered that the distinction was anything but simple, and still less can it be said to be substantial. In fact, we do not hesitate to record our conviction that this

distinction is, with regard to the subject under discussion, as vicious as it is perplexing. If we inquire into the probable reasons which determine a testator in his choice between the two classes of conditions, it will in most instances clearly appear that he was actuated by motives which have no bearing whatever on the question of whether or not he wished his conditions to be enforced. It is a mistake to suppose (as the Judges seem to do) that a testator puts a prohibition or injunction, in the form of a condition subsequent, when he is comparatively indifferent as to whether his wishes are attended to or not, and in the form of a condition precedent, only when he is really anxious to be obeyed, this is not so ; he makes use of the one form or the other, for no other reason than because in the state of circumstances that he has to deal with, it happens to afford the simplest expression of his wishes. Suppose, for instance, that a testator simply desires to make a provision for his daughter *on her marriage with her mother's consent*, in such a case, he would naturally carry his intention into effect through the medium of a condition precedent, if, on the other hand, he wishes to make the provision in favour of his daughter to take effect *immediately* after his death, he will probably leave an annuity to his daughter, with the condition that it shall cease or go over if she marries without her mother's consent. This is of course a condition subsequent, but it cannot be supposed that the testator is less anxious in the one case than in the other to prevent his daughter from making an imprudent match. Yet the form of expression may be of the utmost importance, for there is a good deal of authority for the proposition that the doctrine of *in terrorem* applies exclusively to conditions subsequent. However, this is a doubtful point, and may, perhaps, even yet occasion plenty of litigation before it is finally settled.

We have now only one more modification of the *in terrorem* doctrine to deal with. This last modification, while more

palpably absurd than any we have hitherto discussed, has the great advantage of simplicity. It has been gravely decided that the intention of a testator varies according to the nature of the property with which he purports to deal, and that the very same words which, if he were dealing with personal estate, would be held inoperative to defeat a previous gift, will, if referable to real estate, effectually put an end to the interest of the devisee. This remarkable distinction, and that between conditions precedent and subsequent, experienced rough treatment at the hands of Lord Rosslyn, in the well-known case of *Stacpole v. Beaumont*. His Lordship observes (3 Ves. 95), "It is impossible to reconcile the authorities, or range them under one sensible, plain, general rule. There can be no ground in the construction of legacies for a distinction between legacies out of personal and out of real estate. The construction ought to be precisely the same. I do not see more importance in reality in the distinction between conditions precedent and subsequent. The case of all these questions is plainly this: In deciding questions that arise upon legacies out of land, the Court very properly followed the rule that the Common Law prescribes, and common sense supports, to hold the condition binding where it is not illegal. Where it is illegal the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the Court felt the difficulty, upon the supposition that the Ecclesiastical Court had adopted a positive rule from the Civil Law upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent jurisdiction (it is not right to call it so), in the resort to this Court instead of the Ecclesiastical Court upon legatory questions, which, after the Restoration, was very frequent, in the beginning embarrassed the Court. Distinction upon distinction was taken to get out of the supposed difficulty." His Lordship then proceeds, in no measured terms, to condemn the folly of importing the rules of the Civil Law

into the Ecclesiastical Courts,* and ended by observing, "the authorities stand so well ranged that the Court would not appear to act too boldly whichever side of the proposition they should adopt."

With regard to the rival merits or demerits of the Civil and the Common Law, we do not hold so decided an opinion as Lord Rosslyn. On the contrary, we have every desire to encourage the spirit of compromise. We do not, we confess, entertain such an exalted opinion of the excellence of the Canon Law or the Common Law as to regard the complete triumph of either system in the light of a highly desirable event. We think that either system might, with advantage, accept of modification from the other, but we are unable to adopt the rough and ready form of compromise instituted by the Judges as a satisfactory settlement of their relative claims. It would, we humbly conceive, have been preferable to amalgamate the two systems of Law instead of allowing each of them to exercise more or less undisputed sway in its own allotted domain. Indeed, we venture to submit that almost anything would have been better than the present ludicrous anomaly of construing different passages in the same will according to antagonistic rules of construction. By whatever legal subtleties such a result may be defended, we are afraid that to the lay mind it will always appear strange that a condition in one part of a will should be interpreted to mean something quite different from an identically similar condition in another part. This result does not seem to have been brought about by reason of any overweening regard on the part of the Chancellors for the sanctity of every jot and tittle of the Canon Law; on the contrary, on the partial adoption of that Law they did not scruple to introduce amendments of their own, some of which we cannot conscientiously

* It is remarkable that his Lordship, while praising the Common Law and condemning the Canon Law, should have found fault with the distinction between condition precedent and subsequent, which is a creature of the Common Law.

designate as improvements. For instance, the Canon Law recognised no distinction between conditions subsequent and precedent in restraint of marriage, and attached no importance to the circumstance of a bequest over, two very considerable variations from the doctrine of the Court of Chancery. Although, therefore, we are inclined to agree with Lord Rosslyn in thinking that the Chancellors felt themselves, in some degree, hampered and embarrassed by the concurrent jurisdiction in the matter of legacies assumed by the Ecclesiastical Courts; still, in the face of the wide differences which were permitted to continue, we suspect that the concessions made on their part were not such as they regarded with any great aversion. We are strongly of opinion that the different construction of conditions, according as they affect gifts of realty or personalty, may be explained without having recourse to the supposition of undue clerical influence. A devisee stands on quite a different footing in the estimation of the Court of Chancery from a legatee. While legacies affect only the next-of-kin, devises are injurious to the sacred interests of the heir-at-law. Now between a testator's legatees and his next-of-kin Equity is content to hold a pretty even balance, the claims of the next-of-kin not being invested with any peculiar sanctity, whilst the heir-at-law has always been pre-eminently what is called "a favourite" with the Court. Any interference with the prospects of that favoured individual, who has the divine right of primogeniture on his side, is jealously watched, and, indeed, the measure of favour dealt out to him was so extravagant, and so obviously inconsistent with a just estimate of the rival claims, both of creditors and of next-of-kin, that the Legislature had to interfere and enforce (in spite of strenuous opposition on the part of the highest legal functionaries) the elementary principles of justice; 1st. By making the heir liable to the extent of his inheritance for all the debts of his ancestor; and, 2ndly. By forbidding him to come

upon the next-of-kin to pay off out of personalty the mortgages and charges to which his inheritance had been subjected. The heir-at-law then and the next-of-kin stand at the opposite ends of the scale of favouritism. Starting from this premiss we may deduce the relative positions of legatee and devisee. In so far as their respective interests do not clash with those of the heir, the devisee is the more favoured of the two. He holds a very strong position when put in competition with such unconsidered persons as legatees and next-of-kin, but in so far as he ousts the heir he is considered in the light of a usurper, and the Court is only too glad of any excuse for holding a devise to be inoperative, and so reinstating their favourite the heir.

But whatever may have been the original motive for construing conditions attached to devises more strictly than conditions attached to legacies, whether partiality for the heir or regard for the Canon Law; at the present time there is not a shadow of excuse for making rules of construction vary according to the nature of the property given. If the doctrine of conditions *in terrorem* is held to furnish the rules of construction best calculated to carry a testator's real wishes into effect, the doctrine should manifestly be applied to devises as well as legacies.

It may be observed that even this last-mentioned limitation of the famous doctrine, comparatively simple as it is, has given rise to questions of some difficulty. It has only just been decided, and we venture to doubt whether it has been finally settled, by the present Master of the Rolls (*Bellairs v. Bellairs*, L. R. 18 Eq. 510), that a mixed fund of realty and personalty follows the rule of personalty, and in the same case it was intimated, but not expressly decided, that proceeds of sale of realty follow the same rule.

We have said enough to give some idea of the absurd and perplexing nature of the Law of Conditions *in terrorem*. We must not forget that a complete knowledge of that branch of the Law, so far as it has been settled, is but a

small part of the qualification necessary for deciding on the validity of conditions in restraint of marriage. We have but put aside all the judicially collected rubbish which impedes us at the threshold of our inquiry. We have learnt only to decide under what circumstances a testator shall be presumed to have meant what he has said, and it remains to be seen how far the Law will permit his intentions when discovered by the Canons of Construction already noticed, to be carried into effect.

It is not every condition in restraint of marriage that is illegal. If a condition is what Equity considers reasonable, it has some chance of being enforced. The delicate task of discriminating between reasonable and unreasonable conditions, has, of course, afforded abundant opportunity for the display of differences of opinion among the Judges. On the whole, however, we do not think that the conclusions arrived at are, as a rule, sufficiently remarkable either for their sagacity or the reverse, to be of any great value, whether by way of example or warning; we do not propose, therefore, to dwell at length on this division of our subject, but only to mention shortly some few decisions which seem especially open to comment.

In the first place, Equity shows no indulgence to second marriages under any circumstances whatever. Widow or widower, young or old, childless or otherwise, Equity sees no reason why any one should not be debarred from marrying again under pain of pecuniary loss. This result seems to have been arrived at by easy stages. It was very early decided that a testator might reasonably hold out a pecuniary inducement to his widow to remain faithful to his memory, whether she had any children by him or not, and there is some authority in the early cases for supposing that sons had the like power of throwing obstacles in the way of the second marriage of their mother. It was, however, reserved for Lord Hatherley, when Vice-Chancellor, and the Court of Appeal, in the Chancery Division, to advance

the doctrine as to second marriage by two important stages. Lord Hatherley (*Newton v. Marsden*, 2 J. & H., 356, 31 L.J. Ch. 690) in a very long and elaborate judgment, decided on the balance of authority, that any one may impede the marriage of a widow to the same extent as her late husband, and it has quite recently been held by the Court of Appeal (*Allen v. Jackson*, 1 Ch. Div., 399), reversing the decision of Vice-Chancellor Hall, that the second marriage of a widower is not more favoured than that of a widow. In the entire want of sympathy with second marriages evinced by the Judges, they are not altogether in accord with the Civil Law, which only countenanced restraints on second marriage where the interests of the children of the former marriage might be affected. We confess that, in our opinion, the ancient law might have been followed with advantage. It seems a little hard that persons whose first marriage has not been attended with the natural result should be restrained from contracting a second, particularly, as a learned Judge pathetically observed, where the surviving party is still of an age to do good service to the State by the procreation of children. We are aware that there exists some diversity of opinion with regard to the precise degree of merit attaching to such a service, but without entering into that delicate inquiry, it is enough for us to suggest that most of the objections to the marriage of childless widows and widowers apply equally to first marriages.

The Court does not look with any disfavour upon conditions restraining marriage without consent where such conditions are deemed reasonable, and the judges have felt no difficulty in upholding the validity of conditions whether precedent or subsequent requiring the consent of trustees to the marriage of a legatee under age, indeed it has been held by the Lords Justices (*Younge v. Furse*, 8 D. M. & G., 756), that a testator may legally declare a forfeiture upon the marriage of his daughter (and we presume of any other woman), *with or without consent*, under the age of 28.

This seems a strong decision, and under the circumstances, the testator having himself, shortly before he died, consented to the proposals of the young gentleman, subject only to his daughter's approval, it was particularly hard on the legatee. Even in the absence of any special element of hardship, we think a condition prohibiting the marriage of a woman under 28 can scarcely in fairness be called a reasonable condition. We can quite understand that to elderly gentlemen like the Lords Justices, who were perhaps at the age of 28, only in the first struggles of their professional career, that age should savour of extreme youth, but they should remember that girls are commonly placed in the way of receiving proposals of marriage at the age of 17 or 18, and that to prolong for ten years the inconveniences of an engagement when they might at once be put an end to by the nearest parson, much to the satisfaction of all parties, is indeed a serious responsibility.

But although a testator may prohibit his daughter, under pain of pecuniary penalties, from marrying under the age of 28 at his own absolute discretion without giving any reason whatever, it would appear from the case of *Morley v. Rennoldson*, 2 Hare, 579, that he may not altogether prohibit her from marrying even though he gives what most people would consider a good reason for the prohibition. In that case the testator purported to prohibit his daughter from marrying on the ground that she was suffering from nervous debility, which totally unfitted her for the control of herself, nevertheless the prohibition was held to be void. The evidence indeed went to show that the testator was mistaken in his estimate of his daughter's state of health, but the judgment of Vice-Chancellor Wigram goes the length of affirming that nothing short of an absolute incapacity to contract marriage, such as would in itself suffice to render the ceremony void, justifies a condition in general restraint of marriage. Our sympathy in this case is with the testator rather than his daughter, but in general

the former has much the best of it. Not only is he permitted, and even encouraged, to hinder a woman from marrying any specified individual whom he may happen to dislike, but the law actually considers it reasonable that he should be empowered to impose a husband of his own choice as the price of enjoying his bounty. When not to marry A. B. is considered a punishable offence, we may conceive with what severity the crime of insisting upon marriage with C. D. is regarded by the judges. Lord Chancellor King (*Farvis v Duke*, 1 Vern, 19), waxed very eloquent on the "presumptuous disobedience" of such conduct, and observed that the delinquent highly merited her punishment "she being only prohibited to marry with one man by name and nothing in the whole fair Garden of Eden would serve her turn, but this forbidden fruit." The judges have experienced great difficulty in dealing with those cases where a testator has made his bounty dependent on marriage with consent, without limiting any time after which the legatee may marry without consent. Here the most refined distinctions have been taken, and the authorities are in a chaotic state of confusion. It is not only that all the before-mentioned inquiries may have to be made, 1st as to the nature of the property in dispute, whether realty, personalty, proceeds of sale of realty, or a mixed fund, 2ndly as to the nature of the condition whether precedent or subsequent, 3rdly as to whether there is a gift over, or 4thly an alternative gift—on every one of which points very difficult questions may arise—it is not only that a definite answer has, if possible, to be obtained to some, or perhaps, all of these perplexing inquiries, but that when the required results have with infinite labour been worked out, it often happens that the law applicable to them is involved in so much doubt, and the authorities are so confused and contradictory as to justify the Court in pronouncing a decree for either party it pleases.

The cases on gifts of land, and legacies charged on land,

are particularly unsatisfactory and hard to reconcile. We have seen that in the construction of such gifts the doctrine of *in terrorem* does not apply. This seems to be the only distinction established beyond all dispute. We seek in vain to discover from the authorities how far, or in what respects, the Law as to conditions in restraint of marriage annexed to gifts of realty differs from the Law relating to legacies out of personalty where there is a gift over, so as to eliminate the *in terrorem* factor of the problem, or even whether there is any difference at all. It has often been said that conditions precedent annexed to devises must be scrupulously complied with in order to raise the estate, either leaving it to be inferred, or sometimes expressly stating* that conditional bequests of personalty stand on a different footing; we are, however, unable to gather from the cases, taken collectively, in what the difference, if there be any, consists, and we doubt very much whether a condition precedent in restraint of marriage could be framed so as to be valid if annexed to realty, and void, notwithstanding a gift over, if annexed to personalty. In whatever way the Law may be finally settled, as regards conditions precedent, up to a very recent time we considered there could be no reasonable doubt as to one feature, at least, of the Law applicable to conditions subsequent. We used to be clearly of opinion that if any proposition of Law or Equity could be considered to be established beyond all controversy, it was the proposition that conditions subsequent in general restraint of marriage are altogether void, whether annexed to devises of realty or to bequests of personalty. What then was our astonishment when we found that six very learned Counsel had recently succeeded in convincing (*Bellairs v. Bellairs*, 18 Eq., 510) no less eminent a Judge than the present Master of the Rolls that a condition in general restraint of marriage, whether precedent or subsequent, annexed to a devise of realty, is

* As in the case of *Reynish v. Martin*, 3 Atk., 330, but see *Webb v. Grace*, 2 Ph., 701.

perfectly good. It was unnecessary to decide the question as the ingenious six (who certainly deserved a better fate) were held to be out of Court on another point, but it is somewhat strange, at this time of day, to find six Counsel capable of asserting, and an unusually able Judge capable of taking for granted, as he did in the most explicit and positive manner, the non-existence of what is, we venture to think, the most elementary and fundamental of all the propositions connected with the subject under discussion. Fortunately, we are relieved by a still more recent case before the Lords Justices (*Allen v. Jackson*, 1 Ch. D., 399), from the necessity of considering whether the dictum of the Master of the Rolls may not, after all, be well founded. But while we agree that he was not justified in the truly startling conclusion he arrived at, the mere fact that so distinguished a Judge could be led into so grave and fundamental an error, sufficiently shows the unsatisfactory state of the authorities.

It will, we hope, be understood that in passing judgment on the inconsistent and unintelligible mass of authority which, at present, encumbers the question of the validity of conditions in restraint of marriage, we are far from ignoring the extreme difficulty of dealing satisfactorily with so delicate and complex a subject. While we believe that scarcely anything could be worse than the present state of the Law, we willingly admit that the Judges, in undertaking a crusade on behalf of matrimony, embarked upon an enterprise partaking of the nature of a forlorn hope. It is true that by multiplying distinction upon distinction they added obstacles of their own creation to those which were already sufficiently formidable; but we must not forget the serious character of the impediments which unavoidably obscured the prospect of success. We do not say that the Judges acted wrongly in endeavouring to protect the interests of matrimony against the machinations of crochety testators; we are by no means convinced that if, by the

instrumentality of any moderately intelligible code, a testator could be deprived of the power of creating a forfeiture on the marriage, however eligible, of a legatee, such a consummation would not be desirable; nay, further, if the present Law, with all its defects and absurdities, were successful in securing the object it professes to have in view, if it did, in fact, render it impossible or even difficult to frame a valid condition in general restraint of marriage, we allow there would be some tangible result to set in the balance against the profuse expenditure in litigation occasioned by contradictory decisions and the growth of unreal distinctions, a result that we conceive might be considered by some persons, other than lawyers, as worth, say, a small fraction of the amount netted in costs by the legal profession. But even this set-off cannot be claimed. It is not impossible, it is not even difficult to frame a condition in general restraint of marriage, in such a way as to hold good against the whole Bench of Judges. On the contrary, it is well-known to every country solicitor that nothing is easier than to frame such a condition, and perhaps there is scarcely a country solicitor in good practice who has not framed many of them. The process is delightfully simple,—no elaborate fictions are required, no intricate formalities have to be complied with, such as used to be considered necessary, to throw a decent veil over the proceedings in fines and recoveries,—all that has to be done is, instead of declaring a forfeiture on marriage, to declare that the devisee or legatee shall only enjoy the testator's bounty *until marriage*, in other words, to turn what is technically known as a *condition*, into what is technically known as a *limitation*. It requires no argument to show that the distinction between a condition and a limitation is just as unreal, with reference to the question under discussion, as the distinction between conditions subsequent and precedent. Every condition of forfeiture necessarily implies a limitation until forfeiture,

and it is obviously a mere chance whether a testator, without a lawyer at his elbow, expresses himself in the one form or the other; or as in the case of *Webb v. Grace*, 2 Ph. 701, in some intermediate form, of which the interpretation is as much a chance as was the original choice of words. The distinctions taken on this head are of course extremely fine. The tendency of the recent decisions has been in favour of construing everything as a limitation. Where, instead of an absolute forfeiture, there is an alternative bequest on marriage, it seems, notwithstanding a very explicit gift for life in the first instance, that effect will be given to the clause of partial forfeiture, by way of limitation.* Indeed, in the recent case of *Allen v. Jackson*, already referred to on another point, the Lords Justices expressed much doubt as to whether an express limitation during life was not, under the circumstances, cut down by a subsequent clause of *absolute* forfeiture on marriage, so as only to take effect as a limitation until marriage. If the doubt entertained by the Lords Justices be well founded, we submit that the law relating to conditions in restraint of marriage would die a natural death for want of a subject upon which to operate, for if the words in *Allen v. Jackson* did not constitute a condition, it is difficult to see how there can be any such thing at all as a condition as distinguished from a limitation. The Lords Justices endeavoured to persuade themselves that the distinction between conditions and limitations was a distinction capable of being decided with reference to the intention of the testator. We would gladly think it were possible to accept this view. It is, however, clearly untenable, the distinction is and must always remain a mere question of phraseology. By creating a forfeiture to take place on the happening of any specified event, the intention of the testator, in whatever terms the clause of forfeiture may be framed, is that the legatee shall enjoy his bounty until the happening of that event, and

* But see contra *Bellairs v. Bellairs*, L.R. 18 Eq. 510, noticed above.

no longer, and such intention is rendered neither more nor less evident by the circumstance of its being expressed in terms importing a limitation rather than a condition. The most disheartening part of the business is that this silly verbal quibble is not a legacy of the past, but, on the contrary, has only been fully established within the last forty years. There are several cases where a condition expressed in terms bearing a remarkably close resemblance to a limitation has been held to be void, and we have been unable to find any definite authority (except some dicta in an old case of *Low v. Peers*, Wilmot, C.J., 369) affirming the validity of limitations in general restraint of marriage, until the well-known case of *Morley v. Rennoldson* (2 Hare, 570) before Vice-Chancellor Wigram, in 1843, who says (p. 579): "Until I heard the argument of this case, I had certainly understood that, without doubt, where property was limited to a person until she married, and when she married then over, the limitation was good. It is difficult to understand how this could be otherwise, for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition, and leave the original gift in operation; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage."

With all due deference to the learned Judge, we fail to see how any difficulty, much less any insuperable difficulty, can arise from the circumstance "that in a gift until marriage and no longer, there is nothing to carry the gift beyond the marriage." On this point we may observe, first, that this remark does not apply to gifts "until death or marriage," which words are held to create a valid limitation, and, secondly, that when a testator gives an estate until marriage, he must be held to contemplate, even if he has not in terms provided for, the contingency of the donee never perpetrating the proscribed offence of matri-

mony, and therefore a gift until marriage, although it does not in so many words confer a life interest, is clearly equivalent to an estate until death or marriage. This construction is, in fact, a simple application of the doctrine of estates by implication, a doctrine well known to the Court of Chancery. If there is a gift over on the death or marriage of a donee, the intention becomes, if possible, even more obvious; if, on the other hand, the estate of the donee is enlarged by means of a power or otherwise in the event of his or her dying unmarried, such a disposition is equivalent to an original gift of such enlarged interest subject to a condition in restraint of marriage. But supposing a difficulty might arise, though in no case that we are aware of could any such difficulty have in fact arisen, as to the amount of the estate given in the event of celibacy, surely rather than allow a rule of policy to be evaded by the silliest of quibbles, the difficulty should be boldly faced, as many difficult points of construction have before now been faced, by the Court. We think that the arm of the Court, which is constantly represented as being long enough to reach, and strong enough to defeat, any attempted evasion of its rules whereby a person purports to effect indirectly what he could not have effected directly, has in this case been paralysed by excess of caution. It is not every Judge who regards the present state of the law with as much complacency as Vice-Chancellor Wigram. Lord Justice Knight-Bruce said (*Heath v. Lewis*, 3 D. M. & G., 954): "It must be agreed on all hands that it is by the English law competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity will thereupon cease. But this proposition has been advanced—a proposition which, if true (and I do not deny its truth), is perhaps not creditable to this English law—that if a man give an annuity to a woman who has never married, for life, and afterwards

declares that, if she shall marry, the annuity shall be forfeited, the condition is void, and she may yet marry as often as she will, and retain her annuity." We are unable to see the logical necessity for a distinction, of which the absurdity was apparent to the Lord Justice. We hold that a trifling modification of the doctrine applicable to conditions would suffice to meet the case of limitations.

Where a void condition purports to bring an estate to a premature end, the law interferes, and, by ignoring the condition, allows the estate to run its course. Now let us suppose that an estate purports to come to an end, not through the instrumentality of a void condition, but by the occurrence of an event which the Law has decided ought not to be permitted to have an injurious effect on the interest of the donee, surely the simple and obvious plan of vindicating the policy of the Law would be to ignore the occurrence of the event, and to let the estate run on just as if nothing had happened; if a gift is limited until marriage, let it run on in spite of marriage, just as if the donee had remained single. We venture to say there is not a man of ordinary intelligence, outside the profession, who would hesitate for five minutes in casting aside, as so much hurtful rubbish, all the fine-spun distinctions between conditions and limitations which have been at once the delight and perplexity of the Bench from time immemorial, and by means of which the law of conditions in restraint of marriage has been deprived of every claim to indulgence. To the vice of perplexing and unnecessary distinctions, resulting in absurd and contradictory decisions, must be added this, the sufficient condemnation of any Law, however perfect in every other respect, namely, that all its provisions may with ease and certainty be evaded. In vain do the Judges decide, in vain do Counsel argue, if every principle contended for by the latter and enunciated by the former can be set aside by the machinations of a draftsman. ROBERT COLLIER.

II.—THE REQUIREMENTS OF THE UNIVERSITY OF OXFORD FOR THE TEACHING OF LAW AND HISTORY.*

AT a time when Royal Commissions are looming on a not very distant horizon, it is well to arise and gird oneself to the task of rendering their projects of Reform innocuous by meeting them half-way. Such will probably be the impression produced on many minds by the "Statement of the Requirements of the University of Oxford," adopted by the Hebdomadal Council on the 19th of March, 1877, and immediately afterwards published at the Clarendon Press. Yet it would be unjust to the University to assume that fear of the unknown possibilities of a Royal Commission had been the only, or even, perhaps, the principal cause of the publication of the Requirements. Some such document was called for by the very nature of the movement which has been spreading yearly more and more, transforming many features of the University, and of the life and the teaching within its precincts. So greatly have the men of movement prevailed that one Professor bursts forth into indignant sarcasm on the probability of the "venerable University being knocked to pieces, and reconstructed on a Continental model," with the "barbarous" Continental mode of Professorial and Sub-Professorial teaching. Our object, however, is not scathing sarcasm, but friendly observation and criticism, especially on those portions of the scheme of the Requirements dealing with the University teaching of Law and History. We have, for ourselves, always regretted the

* Statement of the Requirements of the University adopted by the Hebdomadal Council, on the 19th March, 1877, with the Papers upon which it was founded. Oxford, Clarendon Press. 1877.

separation of those studies into two schools, coincident, as it was, with the great and sudden expansion of the examinations in the Faculty of Law, for the Degree of B.C.L. We do not share Professor Chandler's intense dislike to all the features of Continental University teaching, and, in regard to Jurisprudence and History, it is patent to our minds that many useful hints may be derived from the mere fact of the existence, beyond the Channel, of Chairs which have no counterparts in our own Universities. There are nineteen Chairs of Law in Paris, and ten in Toulouse; how many can we boast of in Oxford or Cambridge? There is a Chair of Constitutional Law in the University of Naples, but there is none in the University of Oxford.

Here, at least, is a point in which we must yield the palm to our Continental friends. They have, with all the "barbarism" which some English Professors can alone see in their system, outstripped us in the race of providing for the growing wants of students. Shall we make no effort to come up to them? In Paris, as has been already pointed out in these pages,* an entire supplementary scheme of instruction has been devised, filling up any gaps that may be left in the State Universities, by means of the Free School of Political Sciences. Here men of eminence in their respective branches have been giving courses on Administrative Law, Diplomacy and International Law, Comparative Legislation, Constitutional History, and other kindred subjects. Where are we in this race? It is to be feared, very far behind.

The "Statement of Requirements," which we take as the basis of our present remarks, originated, we learn, in a series of questions sent round by the Vice-Chancellor, in the course of the year 1873, to the various Boards of Studies and Professors, by direction of a Committee of the Hebdomadal Council.

* Law Magazine and Review, Jan., 1875.

The questions were these :—

“1.—Is the present number of Professors sufficient for the studies of the School with which your Board is connected ?

“2.—Is the distribution of subjects among such Professors satisfactory ?

“3.—Will it be expedient to make a distinction between Professors-in-Chief and Readers (or Assistant-Professors) ? And, if so, what should be the relation of the Assistant-Professors to the Professors-in-Chief ?

“4.—Are there any subjects required in your School for which it might be expedient to make temporary provision only ?”

The replies elicited by this circular occupy the greater part of the pamphlet before us, but there is a valuable, though somewhat confusing Appendix, consisting of the Reports and Letters submitted to a fresh Committee of Council, appointed in Easter Term, 1876. The effect of this is that just as we think we have grasped the views of the several Boards and Professors, we find we have yet a further study to make of their later expressions of opinion.

Many of the Reports and Replies are very amusingly characteristic. Unfortunately, with some of the most characteristic and amusing we are not here directly concerned. Otherwise, we should have been glad to draw attention to the curt irony with which Professor Monier Williams and Professor Max Müller alike express their practically identical views on Sanskrit and Philology at Oxford, the latter enclosing, for the Vice-Chancellor's benefit, a pamphlet, showing what the University of St. Petersburg does for the studies of his Chair. But it does fall distinctly within our province to note that in the Report of 1876 the Board of Studies for the School of Literæ Humaniores recommend the creation of an additional Professor and Reader in the Department of Ancient History, for the

express purpose of including "Ancient Law and the History and Comparison of Ancient Institutions" in the curriculum of the public University teaching for that School. And we are glad to see that this recommendation has been endorsed by the Council in their official Statement of Requirements. We feel that we can say this without any disparagement of the value to the University of the Lectures of the Corpus Professor of Jurisprudence. For it is obvious that an additional Professor and Reader dealing with some of the subjects usually treated by Sir Henry Maine would, while not confining themselves to the same track, give a fresh impulse to the pursuit of Archaic Law, and impart a steadiness to its study by undergraduates such as cannot be expected under a necessarily somewhat sporadic system of Lectures. This intermittent character of some of the work of an otherwise very valuable Professoriate is partly due to non-residence, and it is an evil which would lead us greatly to deprecate such a change as is half suggested by Dr. Bernard in relation to the Chair which he rendered so useful by his own residence, as well as illustrious by his eminence. The Assistant-Professors and Readers (with the exception of occasional or extraordinary Professors and Readers) would necessarily be resident, and that is, to our mind, an argument in their favour.

How high an estimate the University of Oxford puts upon an increased number of Lectures may be guessed from the fact that it has given the present incumbent of the Regius Chair of Civil Law an increase of £300 a-year, for five years, to his permanent endowment of £135 ; "on condition of his delivering annually two courses of Lectures, not fewer than twenty in the whole." Of course, it is to be understood that the Regius Professor of Civil Law is always a distinguished person, the value of whose time should be calculated somewhat on the scale of that of a Sir William Gull in the medical world. Otherwise the condition annexed to the increased stipend might

recall to our minds the old proverb, "Parturiunt montes," and we really are tempted to ask why were these things not done years ago? When the Civil Service of India was first thrown open to competition, and Oxford men who became Selected Candidates required additional instruction in Roman Law, the stipend of the Regius Chair of Civil Law, then filled by Sir Travers Twiss, should have been at once augmented, and we do not doubt that good results would have been speedily visible both among the Indian Candidates and in the School of Law and Modern History. In 1873, the Board of Studies for the School of Jurisprudence, then but recently carved out of the old combined school, modestly asked for, "at least one resident Lecturer in Roman and one in English Law." In 1876, the Board of Law Studies had risen to a higher conception of their wants, and considered that: "1. The Legal Teaching of the University ought to embrace the following subjects: (a) Jurisprudence, the Theory of Legislation, the Comparative Study of Law, and Legal History. (b) Roman Law. (c) English Law, including not only the various departments of Private Law, but also Constitutional and Criminal Law. (d) International Law. (e) Oriental Law, and in particular the various Legal systems in force in India. A complete scheme of Legal Study would no doubt also make provision for the teaching of Canon and Ecclesiastical Law."

For the supply of this tolerably comprehensive bill of fare for the Law Student, the Board naturally esteemed the existing staff "obviously inadequate." Their recommendations, therefore, took the following shape, as that of "a provision sufficient for the needs of the University in the present and the immediate future," viz.: "3. (a) Two Professors of Jurisprudence and of the other subjects mentioned above (1. a). (b) Two Professors of Civil Law. (c) Four Professors of English Law, to one of whom would be allotted the Chair of English Constitutional Law. (d) One

Professor of International Law.* (e) One Professor of Oriental Law, making in all ten Professors (that is, six Professors in addition to the existing four)." The number reached by this recommendation would, it may be well to remember, render the staff of Law Professors at Oxford equal to the strength of the Faculty at Toulouse, but would still leave it much below that of Paris. In days when so much is said about the necessity of increased facilities for the systematic study of Law, this is not an extravagantly high level to reach. Yet it is scarcely probable, perhaps, that all the demands of the Board of Legal Studies will be granted. That the proposed Professorship of Oriental Law will be created may not be unlikely, and, considering our immense Oriental interests, it is not too much to expect. There is in the air some idea of extending to Hindoo and Mohammedan Law that process of Codification which has never slumbered in the English branch of the Law administered in India, from the days of Macaulay to those of Sir James Stephen. The task would be one of enormous difficulty, as was acknowledged at a recent meeting of the Law Amendment Society,† both by English and Hindoo supporters of the general principle of Codification. There can be no doubt, however, that if it be attempted, the Oriental Law Professor at Oxford would have a hand in it, as well as in the work more specially belonging to him of directing the studies of the Indian Candidates whom the University of Oxford is at last seeking to attract. Balliol has taken the lead in

* Two, at least, of these subjects for separate Chairs are, by the Inns of Court, huddled together in one Chair with General Jurisprudence and Roman Civil Law, forming a singular illustration of the Law of Hotchpot, which, we fear, none but the present Incumbent could at all adequately fill, with any satisfaction to his hearers.

† Sessional Proceedings, vol. x., No. 14 (P. S. King), containing a Paper by J. B. Phear, Esq., late a Judge of the High Court of Judicature at Calcutta, on "Codification of Law in connection with the Administration of Justice in India," read the 5th June, 1877.

this as in not a few other steps which have marked the progress of University and Collegiate Thought. We, therefore, regard the Oriental Professor as tolerably safe, but it will be far otherwise, we fear, with the proposed Professor of Constitutional Law. Indeed, we are ourselves of opinion that there may fairly seem to be a certain extravagance in asking for a "Professor of Constitutional *Law*," and a "Reader in Constitutional *History*." This is one of the weaknesses in the statement of Requirements arising out of the separation of the Schools of Jurisprudence and History. It appears to us quite inconceivable that men would attend both sets of lectures, and equally impossible that if they did they would not find the two overlapping. Why should not the two Boards have joined their forces, if for this occasion only, and requested the appointment of one Professor of Constitutional Law and History? It may not be too late, even now, for us to throw out this suggestion. Taken as a whole, the Report of the Board of Law Studies embodying their requirements as conceived in 1876 is somewhat unsatisfactory from its brevity. There are, indeed, facts stated which may convey sufficiently to the initiated, and to those who have constantly been watching the progress of Law reading in Oxford, what and how great are the wants to be met. But it must be read in close connection with Professor Bryce's letter of 1874, and Professor Bernard's Report of 1873. In his letter of 1874 Dr. Bryce has shown more clearly than in his later Report what is the nature of the work which he would expect from the Professor of Constitutional Law. And it appears to us that his language expresses exactly what we should expect from the realisation of our own idea of a Professor of Constitutional Law and History. Asking, in 1874, for "at least two Professors of English Law," Dr. Bryce suggests that one of them "would probably devote himself chiefly to its historical side—the History of the Constitution, of the Law Courts, of Legal Institutions generally," and "the other to

its more practical aspects, such as Real Property, Contracts, &c." With such a "Professor" in the field, where would be the work of the proposed "Reader?" There seems to be a pretty general agreement that the occupants of the new Chairs should not be too closely bound down within certain limits of work. Both Dr. Bryce and Dr. Bernard point out the advantages that might accrue, *e.g.*, from a Lecturer on Roman Law illustrating his work by points of contact with English Law, and *vice versa*. Dr. Bryce appears to be somewhat in favour of a Chair of Canon and Ecclesiastical Law, though rather from the point of view of the encouragement (if not endowment) of research than from any conviction of its direct utility. There are in England very few men, probably, outside the pale of the old College of Doctors, who pretend to any acquaintance with Canon Law. Certainly still fewer who could be named in the same day with Canonists like Schulte of Bonn, and Maassen of Vienna, and the only recent edition that we know of the *Corpus Juris Canonici*, is a German one. It is possible that the "Genius loci" may help the establishment of such a Chair at Oxford, and then perhaps the new Professor may see his way to bringing out what we remember a Foreign Canonist urging upon us some years ago as a need of the day, a fresh edition of Van Espen. Both Dr. Bryce and Dr. Bernard recommend the appointment of occasional Lecturers, and Dr. Bryce somewhat nullifies his proposal of a Professor of Canon and Ecclesiastical Law by suggesting that Ecclesiastical Law might be so dealt with, among other subjects "for whose teaching we make at present no provision." But there are two subjects in this list to which we would draw special attention, *viz.* : "Foreign Law, and the Legal History of other Countries." These suggestions are very valuable, and we hope they will not be allowed to drop out of sight. The Commercial relations of Great Britain, no less than her Political relations, render an acquaintance with Foreign Law and the History

of Foreign Legal Systems a very desirable branch of legal study, and it is at a University like Oxford that they could best be introduced into the curriculum. In London, men preparing for the Inns of Court Examinations could hardly be expected to attend Lectures on such subjects, unless they were made part of the Examination. And for this, perhaps, the Inns are hardly ripe. But at Oxford, where for years a certain amount of Foreign Law has been read, in connection with Roman and International Law, and a certain amount of Foreign Law Texts have been read in their original languages for the B.C.L. Degree, such Lectures would only develop and stimulate an already existing branch of study. In the Final Recommendations of the Hebdomadal Council this suggestion, like many others of equal value, is not referred to by name, but a loophole is left for carrying it out under the head either of occasional Lectureships, or Extraordinary Professorships. But if anything is to be done in the matter, the subject must be persistently brought up by name whenever opportunity offers.

We are sorry to observe a similar vagueness in the language of the Council on the kindred subject of the appointment of a Professor of Foreign History, recommended by the Board of Historical Studies. This is also a valuable suggestion, and would work excellently side by side with the Chair of Foreign Law. It is not a case in which, under present circumstances, we can see that any benefit would arise from the two Schools joining forces as we have recommended in the case of Constitutional Law and History. But the two studies ought to be carried on simultaneously, and the Honour Student should read Foreign Law with a view to its illustrating his Foreign History, and *vice versa*. We need hardly say that at Oxford such a study would naturally be Historical as well as Comparative. It is not necessary to point out here how Feudal Law explains the phenomena of Feudal History, or

how the Assises de Jérusalem, and the only recently known Assises d'Antioche,* throw a wonderful light on the state of Mediæval Society. Again we must regret that the Hebdomadal Council has not *eo nomine* adopted the proposal of a Professor of Foreign History, any more than it has the less formidable suggestion of an "Occasional Lecturer on Foreign Law."

In 1873, Profesor Burrows took a somewhat gloomy view of the position and prospects of the Oxford Professoriate in Modern History, and thought that the rise of the Combined Colleges Lecture System, though in itself good, and "meeting a real want of the School," yet had evil effects in diminishing the attendance on Professorial Lectures. But we are not sure that a reason for the comparative slimness of the audiences of some Oxford Professors might not be found in a cause to which Professor Burrows does not advert, and it is a singular one in these days of "Scholares non-ascripti," and Economical Colleges and Halls, viz.: the re-imposition of Statutable Fees which had gone out of use. This fresh tax has been levied both on Historical and Linguistic Studies, and must be expected to produce a certain effect. Professor Burrows thinks "it would be unwise to limit the Professors of History as to period, country, or department of subject." The Board of Historical Studies, in their Report of 1876, seem likewise to be of this opinion, but provide for contingencies by suggesting the limitations they would recommend, if any are adopted. Should any limitations be thought wise, there seems no valid reason why those of the Board should not be taken. They would

* Of this valuable work, recently published by the Mekhitarist Society of S. Lazzaro in Venice, a brief but interesting account has been given by M. Joseph Lefort, in the "Revue Générale du Droit" (Paris, E. Thorin), for March-April, 1877. And the light shed on Mediæval Life by the Customs of Cities is exemplified in the " Coutumes et Règlements de la République d'Avignon," still in course of publication in the "Nouvelle Revue Historique de Droit" (Paris, Larose), as a contribution to the History of Municipal Institutions in the Thirteenth Century.

leave the Regius Professor of Modern History entirely free ; the Chichele Professor they would have to Lecture on the more modern period, from 1485 ; the Ford Professor (not yet in existence) to take Middle English History, 1066-1547 ; and the Professor (to be reconstructed) of Anglo-Saxon and Early English Languages, Literature, and History, the more distinctively Early Period down to 1272. Under this scheme, as perhaps under any other, certain Professors would overlap each other in their courses, but it would not follow that they should do so contemporaneously. The work of the proposed Professor of Foreign History would run parallel, as we have already urged, to that of a Lecturer (who might just as well be a Professor) on Foreign Law, and similarly with the Professor of Indian History. It seems unnecessary to create a Professor of "English Literature in its Historical Aspect, say from 1272," if the Chichele Professor of Modern History is to be limited to the later period. Or again, the reconstructed Professor of Anglo-Saxon and Early English Languages, Literature and History, might carry on his prelections to a later date. The suggestion of a "Professor of Modern Church History, who may be a layman," seems scarcely to fall within our scope, save in so far as the phrase "Modern" may, and probably does mean "Mediæval," in which case he would, to that extent, be the complement of the suggested Professor of Canon Law. But we may be permitted in the course of these remarks on the Reports of the Professors and Boards contained in the "Statement of Requirements," to observe that, some of the Professors seem to have strange canons of interpretation of the Statutes by which their Chairs are governed. Professor Bright, for instance, in this very matter of a Professor of Modern Church History, which seems to have arisen out of his peculiar interpretation of the nature of his own Chair, displays a very singular state of mind. After giving us the information that his Professorship, which is endowed with

a Canonry of Christ Church, is "by the terms of its Foundation, devoted to Ecclesiastical History and the study of the Ancient Fathers," he proceeds, with the most *sancta simplicitas*, to tell us that he has "practically interpreted the words 'Ecclesiastical History' in connexion with the words which immediately follow, and has been in the habit of taking periods of Ancient Church History—those which are covered by Eusebius and Socrates—together with the early period of British Church History, to the close of the History of Venerable Bede—as the subjects of his ordinary Lectures." His extra Lectures, he further informs us, have also been restricted to "Text-books prescribed in the department of *Historia Ecclesiastica et Patristica*." He admits that this leaves "a large portion of the field of Church History which is not provided for," viz. : "the General Mediæval, and the Modern, History of the Church." These periods were not, it appears, practically recognised in the School of Theology in 1873, when Canon Bright wrote on the subject. If they have not yet been introduced they ought to be, and then Mediæval Church History will be, as it should be, a sister-study to Mediæval Law and Mediæval History. We have not dealt with more than a small portion of the topics suggested by so fertile a subject as the "Requirements of the University of Oxford." We have only attempted to awaken attention to some points more or less directly bearing upon the subject with which we are specially concerned. We leave the consideration of the kindred questions raised by the General School of Law Bill to another occasion ; but we earnestly request all who feel an interest in the sound development of Legal studies to think seriously over the changes and reforms that are necessary both at the Universities and the Inns of Court.

III.—CESSER OF CHARTERER'S LIABILITY.

IT has become a matter of common occurrence for a charterer, whether acting as agent or principal, before entering into a charter-party, to procure the insertion of a clause providing that the liability of the charterer shall cease when the cargo is shipped. The words of immunity are generally, although not always, qualified by a proviso "that the same is worth the freight on arrival at the port of discharge," and accompanied by a provision giving the captain "a lien on the cargo for freight, dead-freight, and demurrage." At first sight these words may not appear difficult of construction, but, when more closely examined, it will be found that the intention of the parties as deducible from them is capable of more than one interpretation, and this view is fully borne out by a comparison of the opinions of two learned Judges upon their original meaning. In *Gray v. Carr*, (L.R. 6, Q.B. 548), Bramwell, L. J., observes: "I do not think that the parties intended, nor that they have expressed an intention, that the charterer's responsibilities for causes of action then accrued should be extinguished on shipment. Agreements should be construed on the principle that parties when making, intended keeping, not breaking them;" and in *Christoffersen v. Hansen*, (L.R. 7, Q.B. 514), Lord Blackburn said: "We must interpret this charter-party without reference to whether the ship was British or foreign; and there would, *à priori*, as it seems to me, be some difficulty in saying that 'all liability shall cease' was not a condition subsequent, meaning that all liability, *ab initio*, shall cease on shipment of the cargo." The rule of construction that general words must be limited in their operation if from other words in the document it is to be inferred that the words were not

intended to be used in the general sense, coupled with the rule founded on the maxim "Verba fortius accipiuntur contra proferentem," applied in cases of ambiguity, may possibly have been, in some cases, of undeserved service to the shipowner. We find decisions on similar clauses a considerable way back, and, on a comparison of the clauses then used with those in use among merchants at the present day, it may be thought that the difference is merely due to the mercantile habit of making use of the fewest possible words to express the same meaning. Whether this be or be not the reason accounting for the absence of clear words of intention in the clauses now used, the Courts must, of course, construe them as they stand, and, by looking at all the terms, choose the most reasonable hypothesis of intention of which the document on its true construction is capable.

A review of the course of decisions upon the effect of these clauses furnishes a not uninteresting study, as well as an illustration of the growth of a branch of the Law Merchant.

The first decision necessary to refer to is the case of *Oglesby v. Yglesias* (E. Bl. and E. 930). The action was brought against the charterer for demurrage at the port of discharge upon a charter-party containing the clause: "It is further agreed that this charter being concluded by J. R. Yglesias for another party, the liability of the former in every respect, and as to all matters and things as well before as after the shipping of the said cargo, shall cease as soon as they have shipped the cargo." The Court affirmed the judgment of the Court below in favour of the Defendant, Erle, J., observing: "It may seem improbable that the owner would leave himself without a remedy at the port of discharge; still, if he chooses so to contract, it is not our office to interfere. It is impossible to construe the charter-party otherwise than as exempting the Defendant from all liability after shipment of the cargo." In *Milvain v. Perez*

(3 El. and El. 495), which was an action on a precisely similar clause for damages for detention at the port of loading, the Queen's Bench gave judgment for the Defendant upon the same ground; but in *Pederson v. Lotinga* (28 L.T. 267), the action being brought for five days' demurrage at the port of loading, upon a charter-party containing the following demurrage clause: "Fourteen days to be allowed for loading in the Tyne, or the captain to receive £5 per day for demurrage day by day; and as to unloading, one working day per keel and one-half to be allowed to the freight for unloading, demurrage on and above the said lying days at £5 per day;" and "the charter-party being concluded by L. on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage," the Queen's Bench held that the demurrage referred to in the clause conferring the lien, was the demurrage at the port of discharge, and that the clause of cesser did not divest the Defendant's liability for demurrage already incurred, which was to accrue *de die in diem*. Judgment was therefore given for the Plaintiff.

The next case in order of decision was *Bannister v. Breslauer* (L.R. 2, C.P. 497), which was an action brought against the charterer for delay in loading the vessel, upon a charter-party containing the clause "the charterer's liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead-freight, and demurrage, which he, or owner, shall be bound to exercise." No demurrage days were given in the charter-party, but the "cargo to be loaded and discharged with all dispatch." The Court of Common Pleas, composed of Byles, Keating, and Montague Smith, J.J., gave judgment for the Defendant upon the ground that the cases of *Oglesby v. Yglesias*, and *Milvain v. Perez*, show that discharging the

charterer from all liability, and giving a lien upon the cargo, is not unusual, and that upon the true construction of this charter-party the liability of the cargo to the owner's lien for freight, dead-freight, and demurrage embraces detention at the port of loading, as well as at the port of discharge. The effect of this judgment was, on that charter-party, to give the shipowner a lien for unliquidated damages incurred at the port of loading.

The next case in which the subject was incidentally, though very fully, discussed in the Exchequer Chamber, was the case of *Gray v. Carr* (L.R. 6, Q.B. 522). This was an Appeal from the decision of the Queen's Bench. The action was brought by the shipowner against the consignees and holders of a bill of lading. One question in the case was whether words inserted in the bill of lading incorporated the terms contained in the charter-party, as against the Defendants. Another question argued was whether, assuming the first to be answered in the affirmative, the cargo—there having been a short loading—was subject to a lien for dead-freight; but the question, so far as material to the subject now under discussion, turned solely upon the construction of the charter-party, which provided that "fifty running days are to be allowed to said merchants for loading, and to be discharged as fast as ship can put the cargo out, and ten days on demurrage, the owners to have an absolute lien on the cargo for all freight, dead-freight, demurrage, and overage; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge." The vessel having been detained eighteen days, beyond the ten days, on demurrage, at the port of loading, the questions whether the charterer was absolved, and whether the cargo was subject to a lien in respect of this delay, were discussed by the learned Judges in their judgments. Cleasby, B., was of opinion that the lien could not be enforced in respect of the

damages due for detention beyond the demurrage days, but that, whether the demurrage days are occupied in loading or discharge, the charterer is equally discharged as soon as the vessel is loaded. Brett, L.J., thought the proposition that the liability of the charterer in respect of damages for short loading, and for demurrage, and for detaining the ship beyond the demurrage days, ceased on the loading a sufficient cargo, was not sound; and that the interpretation of the charter-party by the Judges who decided *Bannister v. Breslauer* was too severe. The learned Judge proceeds, "I cannot but think that the safer, and juster, and more correct construction of the clause is that it absolves the charterer, when once cargo of sufficient value is on board, from all liabilities which, but for it, he might incur in respect of anything happening after the sailing of the ship, or, more probably speaking, after the bill of lading is given, as it were, to replace the charter-party;" and Channell, B., says, "Probably the charterer's responsibilities, which are to cease, are the responsibilities in respect of those matters for which a lien is created," and, referring to *Bannister v. Breslauer*, adds, "If the demurrage referred to was demurrage properly so called, then I agree with the decision; if, however, as certainly rather appears to have been the case, it was merely unliquidated damages for the detention of the ship, then I think the decision somewhat doubtful, and to be supported, if at all, by the fact that the words as to cesser of responsibility were stronger than here. The attention of the Court does not appear to have been drawn to the fact that the demurrage then claimed was not demurrage properly so called, but only unliquidated damages, and, therefore, the opinion of the Judges that a lien was created for this so-called demurrage is not entitled to the same weight as I should have been disposed to give it if the point had appeared to have been carefully considered." Bramwell, L.J., thinks that the words used are not sufficient to show that "responsibilities" mean

"responsibilities for past breaches of agreement," and, if so intended, "be extinguished" should be substituted for "cease," and clearly, all breaches are not provided for by a remedy, for if there was no advance at the port of loading an action would lie against the charterer, and that the responsibilities which are to cease are those which the shipowner, without loss to himself, may render unnecessary in the case supposed, and that if *Bannister v. Breslauer* is inconsistent with this view the learned Baron must intimate his doubt of that decision.

The next case decided was that of *Christoffersen v. Hansen* (L.R.7, Q.B. 509). The action was brought by the shipowner against the charterer for damages for detention at the port of loading. The breach of the charter-party complained of was for not "loading the ship in regular turn," and the clause in question was "the charter being concluded by Defendant on behalf of another party resident abroad, all liability of the Defendant should cease as soon as he had shipped the said cargo." No lien was given to the owners. The Court gave judgment for the Plaintiff. Lord Blackburn, reviewing the cases above cited, observed that the judgments of the Court of Common Pleas in *Gray v. Carr* seemed clearly to show that the ground of their decision, that all liability of the charterers (in respect of it) ceased, for the past as well as the future, was that there was an absolute lien given for dead-freight and demurrage, whilst here no lien was given; and *Pedersen v. Lodinga* seems a direct authority that a clause like the present is not enough to enable the Defendant to get rid of all liability as to vested rights of action. Lush, J., adds reasons, "If there were any provision giving the shipowner an equivalent advantage that would be a very good reason for his absolving the Defendant altogether, but there is no such provision," and adds, "I think, therefore, that the more reasonable construction to put upon the clause in question is, that it was intended that as soon as the cargo was put on board the

contract was to be at an end, so far as the Defendant was concerned, and he was to incur no further responsibility, remaining, however, liable for any breach of his contract that had occurred up to the completion of the loading."

In *Francesco v. Massey* (L.R. 8, Ex. 101), the action was brought for five days' demurrage at the port of loading, upon a charter-party containing the provision "and ten days on demurrage, over and above her said laying days, at £8 a day; charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." The Court gave judgment for the Defendant, Bramwell, L.J., observing, "It is impossible to say that this would not give a lien for demurrage incurred at the port of loading, as well as at the port of discharge, and, in order to give effect to clear words, we must hold either that the charterer's liability was contingent on his not loading a cargo, or that, if a cause of action vested, it was defeasible and divested on the loading of the cargo." This decision was affirmed in the Exchequer Chamber, in the case of *Kish v. Corry* (L.R. 10, Q.B. 553), where the further question (although not necessary for the decision of that case), whether the lien for "demurrage" would have extended to damages for detention beyond the demurrage days, was discussed in the judgments. The question turned upon the construction of the following clauses: "Ten days' demurrage for all like days above the said days, to be paid, &c.;" "Charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage." The action was brought for five days' demurrage at the port of loading. Lord Coleridge thought that when the question arises upon a similar clause, when the shipowner sues, not for demurrage, but for unliquidated damages for detention at the port of loading, and the charterer relies upon the exempting clause, it will be held that the charterer's liability ceases on loading, and the lien

attaches." Brett, L.J., observed, "That if the true interpretation of the clause be that the charterer's liability is to cease, as well for past as for future breaches, but only a partial remedy given by lien to the shipowner, that is, that he can exercise his lien for demurrage, but not for detention, he should think it so unjust that he should be prepared to overrule decisions on which it is based, but he was inclined to think that the interpretation to be adopted at the present day is that the charterer's liability for past breaches is to cease upon loading the cargo, but the remedy of the shipowner is given against the consignee to the extent of his remedy against the charterer. The learned Judge proceeds, "I feel certain that when the occasion arises it will be held that 'demurrage' includes detention at the port of loading." Cleasby, B., observes, "On this question I will only remark that the clause may fairly be considered as referring to those matters, such as payment, which are contemplated as arising upon the contract, and not to those which arise to a breach of contract by detention." Amphlett, L.J., and Pollock, B., were of opinion that the charterer's liability is to cease only to the extent that the owner has a lien on the cargo.

In *Lister v. Haansbergen* (L.R. 1, Q.B.D. 269), the Queen's Bench Division held that the words "loading excepted," inserted for the shipowners' protection in a similar clause of cesser of liability, excepts all liability connected with loading, and not merely the obligation to load a full and complete cargo. Lord Blackburn, in the course of the case, expressed great doubt, the charter-party giving demurrage days only at the port of discharge, whether the clause "the owners and master agreeing to rest solely on their lien for freight, demurrage, *and all other claims*," would give a lien for unliquidated damages for detention at the port of loading.

In *French v. Gerber* (L.R. 1, C.P.D. 737), the action on the charter-parties was brought to recover damages against

the charterers (i.) for not giving orders at the port of call as to the ship's port of discharge, and (ii.) for giving orders for the ship to discharge at a port which was not a "good and safe port." Upon demurrer to a plea setting out the following clause in the charter-party, "It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at the port of discharge; but the owners of the ship to have an absolute lien on the cargo for all freight, dead-freight, and demurrage, which they shall be bound to exercise," the Common Pleas Division gave judgment for the Defendants. Brett, L. J., in giving judgment, said "even though the mere delay of the ship by not giving orders at Falmouth, might be treated as subject to the demurrage rate, and therefore, in such a charter-party, subject to the lien for demurrage, as suggested by some of the Judges in *Kish v. Corry*, yet the other damages sued for cannot we think be brought within such a rule. A part of the damages are obviously unliquidated, and for such part there is no lien. Such part is not the 'freight, dead-freight, or demurrage,' for which a lien is given in this charter-party. So far as the damages which are claimed are covered by the lien, we think there can be no doubt that the charterers are absolved." The learned Judge having reviewed the above quoted cases, comes to this conclusion:—"The rule, therefore, seems to be that where the words of the absolving part of the clause plainly show that *all* liability is to cease on loading, it is to cease both as to antecedent and future liabilities, and without regard to any lien; but where the words of the absolving part are open to either interpretation, then without regard to lien, liability as to future transactions is not to accrue, but liability as to antecedent breaches is to cease only so far as an equivalent lien is given. It follows, that the Defendants are absolved by the clause in respect of all the damages sued for, whether a lien be or be not given as to part of them."

This judgment was upheld in the Court of Appeal by Mellish, Baggallay, and Bramwell, L.J.J. (L.R. 2, C.P.D. 247), although on somewhat different grounds. In Mellish's, L.J., opinion, the parties have reasonably supposed that the clause in the charter-party, "that 12 working laying days are to be allowed the freighters for loading the ship at port of loading and waiting for orders at port of call, 24 *hours after the master has given notice in writing, &c.*, and 15 days on demurrage over and above the said laying days," &c., provided a sufficient remedy for any inconvenience or damage which the shipowners were likely to sustain from not getting proper orders as to the port of discharge. The learned Lord Justice bases his decision on the rule which he recognises the Courts have acted on, that the exoneration ought not to be extended beyond the lien. Baggallay, L.J., entertained some doubts; was of opinion that the decisions show that the exoneration is co-extensive with the creation of the lien. The learned Lord Justice thought that in the application of this principle there is no distinction between liabilities accruing before and those accruing after loading. But entertaining doubt whether the damages sustained were not covered by the lien, he did not differ in his judgment. Bramwell, L.J., did not think the clause as to lay days counting was an entire compensation for all the damage that might happen, but that the shipowner must be taken to have intended to take the risk, inasmuch as he consented to the insertion of the words of immunity.

The last decision upon the subject (*Sanguinette v. Pacific Steam Navigation Co.*, L.R. 22, B.D. 238) was given by the Court of Appeal, composed of Mellish, Brett, and Amphlett, L.J.J. The case turned upon points not material to the present discussion, but in delivering judgment, Brett, L.J., observes:—"If the demurrage clause were to be confined to a certain number of days, I should entirely agree that in the clause which gives a lien, demurrage is to be enlarged, and will not only include demurrage days proper, but also

days of detention, where a claim is to be made in the nature of demurrage."

These are all the cases upon the clause in question, and it has been thought necessary to examine them all, with a view to arrive at some general rules, which will serve to ascertain the rights of parties to such contracts for the future. The result seems as follows:—

1. In the absence of clear words distinctly showing intention, the liability of the charterer, in respect of breaches of the charter-party committed before the cargo is loaded, is to cease so far, and only so far, as a lien is given in respect of the damages resulting therefrom.

2. A lien is given in respect of demurrage properly so called, whether incurred at the port of loading or at the port of discharge, by a charter-party containing a general demurrage clause, not appropriated specially to the one or the other, and giving the captain a lien on the cargo for demurrage.

3. A lien is given in respect of damages for detention, whether incurred at the port of loading or discharge, by a charter-party containing no demurrage clause, but giving the captain a lien on the cargo for demurrage.

4. A lien is not given in respect of demurrage incurred at the port of loading, where, on its true construction, the charter-party indicates that the lien was only intended to be given for demurrage at the port of discharge.

The third proposition depends for its support upon the case of *Bannister v. Breslauer*, and this case as has already been shown, has been questioned by learned Judges on different occasions. The rule that some meaning must, if possible, be given to clear words (demurrage) seems to have been the real ground of that decision. The point not having been since raised on Appeal, it must be treated as binding, and whether right or wrong, is entirely consistent with what it will be now sought, as another rule to be deduced from the above decisions, to show, is the opinion of most learned Judges, namely:

5. That on a charter-party containing the ordinary clause of cesser of liability, demurrage clause, and power of lien, the captain will have no lien for damages for detention, beyond the demurrage days at the port of loading. It follows, of course, upon the first proposition, that the charterer would remain liable in respect of such detention. The only Judges who appear to have dissented from this view, are Lord Coleridge, Brett, L.J., and Grove, J., and this, be it observed, in a case (*Kish v. Corry*) in which the point was not before the Court for decision. Lord Coleridge and Grove, J., stated no reasons, but Brett, L.J., after making the observations before quoted, proceeds, "It may be said that this difficulty may be obviated by holding that the liability of the charterer was to cease only in respect of the delay of the vessel during the demurrage days, and that the lien would attach for that only, and that notwithstanding the clause of exemption, a right of action would remain against the charterer for delaying the ship at the port of loading beyond the demurrage days," and then adds, "*That* construction seems hardly consistent with the decisions in which it has been held that the charterer's liability is to cease for past breaches of the charter-party, at all events, in the detention of the ship." With great deference to the learned Judge, it is difficult to see which of the above-quoted decisions are inconsistent with that construction. They appeared (in the same case), as before pointed out, consistent with that construction to Cleasby, B. In *Gray v. Carr*, the question was actually before the Court (Exchequer Chamber), and decided by four of six learned Judges in favour of the present contention. Bramwell, L.J. (at page 528), observes, "In the absence of all evidence, we must give to the word 'demurrage' its known legal meaning, and this excludes from the operation of the lien, the claim for damages caused by further detention," and Cleasby, B., adds "now the word 'demurrage,' has a known legal meaning—viz., the additional period during which the

vessel may remain by agreement of the parties." Kelly, C.B., and Channell, B., agreed in this view, and, as before pointed out, Lord Blackburn, in *Lister v. Van Haansbergen*, expresses a similar opinion. Then, if Lush's, J., reasoning in *Christoffersen v. Hansen* (approved by Bramwell, L.J., and Cleasby, B., in *Francesco v. Massey*, and impliedly adopted by Mellish and Baggallay, L.J.J., in *French v. Gerber*) be the true test, the absence of any provision giving the shipowner an equivalent advantage would conclusively show that the charterer was not intended to be protected from damages caused by detention beyond the demurrage days. If the principle stated be the true one, it is submitted that the ground of the decision of *French v. Gerber* in the Court below, is erroneous, and the judgment of the majority in the Court of Appeal, proceeding as it does on the discovery of an equivalent advantage, is tantamount to a reversal of it. The observations of Bramwell, L.J., in *Gray v. Carr* (p. 548), as to an action lying against the charterer where there had been no advance at the port of loading, and that of Cleasby, B., in *Kish v. Corry* (p. 561), "I think that the natural meaning of the words 'liability to cease' is that the charterer's liability is to be put an end to upon a certain event, not that his obligation should cease as regards carrying into effect the contract afterwards," seem (in charters containing no provision for an equivalent advantage) in favour of the inference that the absolution was not intended to apply to a duty incapable of performance until after the condition had been fulfilled.

HERBERT W. LUSH.

IV.—LAW AND SOVEREIGNTY.

THE intimate connexion between law and sovereignty, or, in other words, between laws and the lawgiver, forms the most important branch of the subject matter of Jurisprudence. The identification of law, or rather of the force which compels obedience to a law, with the coercive force of the sovereign, was one of the chief results obtained by the Analytical Jurists, in their magnificent work of determining much that had been hitherto vague and unscientific in the study of Jurisprudence. They define every law or rule to be a command;* or, to quote the summary of their conception of law, as given by Mr. Justice Markby,† law is the general body of rules which are addressed by the rulers of a political society to the members of that society, and which are generally obeyed. It is, of course, easily perceived that sovereignty is implied in this definition as already existing, though Austin has placed his examination of it last in order of discussion. If, he says, a *determinate* human superior, *not* in the habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is Sovereign in that society, and the society (including the superior) is a society political and independent.‡

Sir Henry Maine's two celebrated lectures on Sovereignty, forming the last, and, in fact, the summary of his series published under the title of "The Early History of Institutions," sound the first warning note of opposition to the analytical identification of law with the coercive force

* Austin's Province of Jurisprudence determined (Campbell's edition), vol. i., p. 90.

† Elements of Law, sect. 7.

‡ Austin's Jurisprudence, vol. i., p. 226.

of the sovereign. It is true that previous lectures had prepared us to meet this opposition,* but until the last volume appeared it had not been distinctly set forth and made the direct object of discussion.

The source of the arguments advanced by Sir Henry Maine, against this definition, is historical rather than juridical. He claims that the customary law of India, and therefore of Aryan history in general, affords historical proof that law is not always the outcome of sovereign power. And this leads him to complain that the analytical definition is applicable only to modern European Law, and not to law in general; that Mr. Austin has arrived at it by a process of "abstraction," and not by a study of history; and that, in consequence of this process, sovereignty has been placed at the apex of his logical sequences, instead of being the very first political element to be investigated and defined. Mr. Justice Markby has already, in these pages, appeared in defence of the practical value of abstract scientific conceptions, on the ground that "what is valuable for one purpose is valueless, or of much less value, for another;" what, therefore, is valuable for the study of Jurisprudence is valueless for the inquirer into the history of early institutions. But admirable as this defence is, there is a much broader platform upon which to judge the value of abstract reasoning. It is contained in the application of the principle enunciated by Mr. Spencer in his *First Principles*, that all human beliefs originally contained, and, perhaps, still contain, some small amount of verity. The arguments of Sir Henry Maine in his two lectures on Sovereignty, that History should, more than any other science, go hand-in-hand with such a closely connected element as Jurisprudence, embrace, therefore, all that he could wish, without destroying the historical value of Analytical Jurisprudence. Analytical reasoning arrives at the conclusion that law may be said to be identical with the coercive force

* *Ancient Law*, p. 7; *Village Communities*, p. 67.

of the sovereign; and it remains for us to see how far History coincides with this view—how far, in short, History declares this definition of law to be tolerably accurate as a general definition, and not only of modern law in particular.

It will, then, be our task to follow out this process. We must inquire, first of all, into the historical evidence capable of being scientifically applied to the development of sovereignty as one of the political agencies of the progress of mankind. And, in order to do this, it will be necessary to note the forms of society corresponding to the several stages of this development. The bonds of connexion which the sovereignty may be discovered to possess with its subject unit, will, to a great extent, determine our second inquiry, namely, the definition of the law of the period.

The scope of such an inquiry is materially lessened by two important facts. First, the admission that the analytical definition of law is a fact of modern political history; and, secondly, that the application of the comparative method enables us to transfer this definition to the whole realm of fully developed national history, when the barriers of primitive society have been broken away and individual man has to reckon with individual man for the political necessities of his times, instead of sharing his obligations and his rights with a collective social unit. Our present inquiry will, therefore, belong to the earlier portion of the history of sovereignty. Now it is important to note, at this juncture, how far the value of historical evidence on a fact of man's social life can reach. I take it that it rests entirely upon its position in the whole realm of history, not upon its existence at any one ascertained epoch. If, for instance, the evidence be proved to be of the most primordial type, as well as the most developed, then there is strong argument for the origin, the continuous existence, and, in fact, for a pretty clear universal definition

of the fact in question. If, however, the evidence belong solely to a middle period of history, a period which depends upon a prior period for its origin, and upon a subsequent period for its importance, then that evidence appears to me not to obtain the full force of an argument against a fact of modern history. I have put the case in this way in order to meet my subsequent arguments, though, of course, other arrangements of historical phenomena could easily occur to the mind.

It is not my intention to make this paper a criticism of Sir Henry Maine, but it becomes necessary to ask now, what is the period of history with which Sir Henry Maine deals? At most with the branching off from the parent stock of those great races to which the world of progressive civilization has invariably belonged—the Semitic and Aryan Races.* It is true he recognises the existence of a society in a state of nature, evidence of which, he says, was not forthcoming in Austin's age; but he nowhere treats this epoch historically, or as showing any capability of giving evidence on the subject of Ancient Law. At the farthest, he does not examine, critically at all events, any stage of society beyond that of which the great Indian examples of communal tribeship are types. Within the great unity of history, however (to use by analogy the title of Mr. Freeman's Rede Lecture), there exists a mass of people who have influenced the polity of the human race, and who should influence the historical thought of its most advanced members. History, it has been observed, commenced with the first man's talk to his first child; and the evidences of this history we find not only in modern political nations, but in modern barbarism.† Though the examples of primitive Indian history existing almost down to modern

* Vide *Early Institutions*, p. 65.

† Sir John Lubbock joins issue with Sir H. Maine's historical scope. Vide *Primitive Man*, Appendix i.; *Origin of Civilization*, pp. 2 *et seq.* See also *Spencer's Prin. of Soc.*, i., 106, on the whole question.

times, and the comparisons with a professedly early Irish history are too complete to leave any shadow of a doubt as to their critical worth to the historian and Jurist, yet the period thus arrived at in Indo-Celtic history, and by strong inference in Aryan history, is not the earliest period in the history of man, or in the history of law and sovereignty. The chief feature that it exhibits, or, at any rate, the chief feature for our purpose, is the aggregation of several families into a village community, and a further aggregation of village communities into a gens or tribe. The splitting up of the Aryan and Semitic races into detached peoples commenced after the formation of aggregated communities, and it was rather political than natural causes which induced one set of Aryan tribes to travel beyond the Hindoo Koosh for a home, and another set through the forests and across the sea to Erin; and thus many of the most important systems upon which the modern political fabric is built, were originated, not in India or in Europe, but in that common home from which Indian, Greek, Roman, Celt, and Teuton departed on their several ways.*

But there was a primitive system from which Semite and Aryan broke away; a primitive system which exhibits as firm traces of consistent organisation, though modified here and there, as the more recent Semitic and Aryan systems. It is within this primitive system that the early history of sovereignty commenced. The question, then, practically resolves itself into this, does research into this early period of history confirm the conclusions of the Analytical Jurists with regard to law and sovereignty, and does it, therefore, alter or oppose Sir Henry Maine's argument against these conclusions.

There are two sources of knowledge of some of the

* See Freeman's Comparative Politics, lect. ii.; Mommsen's Rome (Eng. Trans.), vol. i., p. 18; Bunsen's Egypt, vol. iv., p. 562; Max Müller's Science of Language, ii., 236.

most important social institutions belonging to an early period of history. These are (1) the survivals, which may be seen in later periods, existing alongside of the new growth or in written records; (2) living examples which have come down to modern times crystallised, so to speak, at their earliest stage of development, or which, after having progressed a short distance, have subsequently retrograded.*

Of course, crystallization and retrogression are not exact types of the early period they represent, but the variation in both cases is extremely minute. Crystallization may produce a greater clinging to one form than to another; retrogression may not be along the self-same path that the progression took, but, on the whole, a tolerably clear view of primordial society may be obtained from these sources. Of the first class of evidence we have sufficient examples in our own national history, social and political, and for this class Mr. E. B. Tylor has supplied a correct and apt terminology in the word "survival." Of the second class uncivilized tribes may be cited in illustration, for they show little tendency to alter their social activities and structures under changed circumstances, but die out rather than adapt themselves.†

From these observations it will be seen that it is better to commence with the latest period under notice and work backward; for by so doing we not only detect the survivals of the earlier period, but we reflect back, so to speak, the evidence thus obtained on to the evidence acquired from independent sources, and thus lend additional force to the argument we have in hand. I adopt this plan, therefore, with reference (1) to the external structure of the society containing sovereignty, and (2) to the internal regulations.

* J. S. Mill's *Rep. Government*, pp. 26-7; Spencer's *Princ. of Soc.*, i., 106; Niebuhr's *Anc. Hist.*, ii., p. 97.

† Spencer's *Prin. of Soc.*, p. 598. Modern Bedouins show us a form of society which has remained substantially the same these 3,000 years, or more.

I.

The latest period for my purpose is the earliest period that Sir Henry Maine arrives at in his historical evidence on this subject. This I shall term the communal epoch in the history of sovereignty. The law which obtains at this period is customary law: that portion of the whole body of law which is claimed as being historical proof against the definition of law as the coercive force of the sovereign; that portion of law which, according to the Analytical Jurists, the sovereign permits, and therefore commands. The sovereignty of the period is represented either by a corporate body of chiefs, or by a single head with a council of chiefs, the corporate body being in both cases the distinctive feature.

But there was also another species of sovereignty, and another species of law, existing alongside, and exercising power alongside, of communal law and sovereignty. It was a still surviving relic, shorn of all independence indeed, of an earlier age, when as yet the communal system had not been developed—it was patriarchal sovereignty and paternal law.

For if we examine the nature of the communal sovereignty we find that it has authority, not over individual personages, but over groups of individuals, constituted chiefly and most anciently, of the natural offspring, and therefore, answering in some measure to the modern notion of family. In other words, the political unit with which the sovereign has to deal is not the individual but the family group—it is a corporate, not a personal unit.

Now, this peculiar formation of society was not the product of the statesmanship of the period, but rather of the history of the period. We have not, therefore, to seek its origin in the decrees of a legislative assembly, but in an antecedent period of history. This antecedent period is clearly traceable by means of the very features which

illustrate the later period; for these corporate units are not so closely welded together that the crevices between them cannot be discerned. The formation of a larger society, says Mr. Spencer, results only by combination of smaller societies, which occurs without obliterating the divisions previously caused by separateness.* Again, the sphere of usage or customary law was not the family, but the connexion of one family with another and with the aggregate community;† and though it is only a conjectural explanation of the scantiness of ancient systems of law, as they appear in the monuments in which an attempt was made to set them formally forth, that the lawgiver attempted to fill, so to speak, the interstices between the families;‡ it is a conjecture which follows pretty closely the forms of a logical sequence, and agrees pretty closely with what we see elsewhere in history.

(a.) No people in the world developed the spirit of individuality so marvellously as the Greeks. Yet their early institutions are intensely corporate, just as much so as those of their Hindoo cousins, or, indeed, as those of any of their Aryan kinsmen. What Mr. Grote, Mr. Gladstone, and Professor Curtius have written on this subject, nay, what is displayed throughout the Homeric poems, is too well known to need repetition. Stating it shortly, the tribes were divided into brotherhoods and clans or houses. Now, the clan was the lowest aggregate which possessed any distinct political value—the clan, with chiefs like Agamemnon and Achilles at its head. But at the earliest period of history, the interstices between the families composing the clan were so apparent that Aristotle distinguishes the latter as the offspring of some special compact.

* Spencer's *Prin. of Soc.*, 485.

† Maine's *Village Communities*, p. 79.

‡ Maine's *Village Communities*, p. 114. The following is the general characteristic of the village community:—A group of families united by the assumption of a common kinship. *Ibid*, page 12.

This view is supported both by Niebuhr* and Grote.† Though I cannot perceive any evidence of the special compact, for history rather points to a natural aggregation of kinsmen, the mere fact that the theory of special compact has been propounded by such authorities suggests unmistakeably the independent origin of the family. And there is much further evidence. The chiefs in the *agora* did not interfere in dealing with homicide, but left it to the personal vengeance of the kinsmen and friends of the deceased‡ : and the Lacedæmonians held the doctrine that the door of his court was the boundary of every man's freedom ; without, all around, the authority of the State, within, the master of the house, ruled as lord.||

(b.) The same features are visible in the early days of Rome, and the modern historian has no difficulty in tracing the lineaments of antiquity by the aid of survivals in the later history. Professor Mommsen not only positively asserts that the Roman State was based upon the Roman household,§ but goes deeper into the details of this original homestead. Even within the Palatine city, he writes, there was hardly a true and complete amalgamation of the different constituent elements of the settlement ; there was as yet no common hearth for the city, but the various hearths of the *curies* subsisted side by side, and Rome as a whole was probably rather an aggregate of urban settlements than a single city.¶ Of course this picture is far from perfect ; but it should be remembered that comparatively fewer traces of the primitive state of things have been preserved in the case of the Romans than in the case of any other Indo-Germanic race.**

(c.) With these examples before us, and by the light of modern science, it will not bring any special religious

* Hist. of Rome, i., 264

† Hist. of Greece, iii., 73-7.

‡ Grote's Hist. of Greece, ii., 125.

|| Müller's Dorians, ii., and foot notes.

§ Hist. of Rome, i., 65.

¶ History of Rome, i., 58.

** Mommsen's Hist. of Rome, i., 157.

element into prominence if the most famous of all historical evidence is quoted—that of the Hebrew people. It is impossible in a single paper to produce the whole range of evidence on the subject, which would form matter for a volume. It is, therefore, necessary to quote the most familiar and also the most typical instances. Greece and Rome represent early Aryan development; Israel, the fullest Semitic development. The evidence from this source is most perfect. I shall summarize its features to correspond with those already pointed out in Greece and Rome; for though a much more comprehensive survey could be made it would be at the expense of conciseness and perspicuity.

Regarding it all from below upwards, says Ewald,* one of the greatest of Biblical critics, we see three well-marked stages in which the whole broad and firm edifice rises aloft. First comes the individual household, which maintained itself very strongly in its original wide independence and power, and therefore embraced numerous human beings of a very diverse character. Several single households together form, in the second place, a clan. Several clans, in the third place, are united together into a tribe. As in Greece, the clan is the lowest political unit; for the Elders who formed the national council were not every one the father of an actual family.† It is true that more than 400,000 men completely equipped were at times counted at a meeting of the assembly (Judges, xx., 2; xxi., 16; 1 Chron., xii., 23-28); but the actual deliberation took place in the midst of only the Elders, each of whom had previously to come to an understanding with his men.‡ As in Greece, also, the interstices between the families composing the clans are plainly visible: for each individual household of the tribe had its definite portion of land, which was for ever to remain the unalienable heritage of this house.§

* *Antiq. of Israel* (Eng. Trans.) pp. 242, 243, and Notes.

† *Ibid*, 245.

‡ *Ibid*, 247.

§ *Ibid*, 177, and Note 1.

And we have a still further parallel in that, in cases of crime it was long customary to make the children, as well as the guilty party, expiate the offence;* and that, along with the great central sanctuary, there existed a multitude of smaller ones,† which doubtless expressed the household religion, an example of which we have in the case of Laban's household gods.‡ It is not difficult to understand from such evidence as this, that it is clearly perceivable when the domestic life first overstepped its narrowest limits, and one household, if only for the sake of external security, endeavoured to bind itself as closely as possible on to another, thus endeavouring to build a higher household, without its being possible to break down the internal partition walls between the individual families.¶ To conclude the evidence of this period, I will quote the summary of Ewald as containing the very gist and key-note of its principal features. "From first to last," he says, "the law regards the individual only as a member of a household—the primary, and the closest, and also the most permanently enduring human community."

We are now in a position to state, that, from internal evidence, we can define a primitive state of society, which exhibits for its chief feature, that the highest aggregate of human beings does not assume too great a numerical force to make the term family, roughly speaking, applicable to it: or, in other words, the family represents to this age, what the nation does to modern times. We can, in short, claim for the patriarchal family all the qualifications necessary for it to possess an independent sovereignty and law and be itself independent. I shall presently show that it may also be termed political.

The term patriarchal is unfortunate in having a cluster of associations surrounding it, wholly unwarranted from its

* *Ibid*, 168, 169, 190. † *Ibid*, 128.

‡ *Hist. of Israel*, i, 356, and *Antiq. of Israel*, p. 263.

¶ *Antiq. of Israel*, pp. 242-3.

historical value. It would take too long a disquisition to clear this away, and it would only introduce another chapter into the absurd controversy between Locke and Filmer. But a general idea of the term is necessary. Its nucleus and origin was the natural family of a single pair: of course modifications, or rather developments, of this phase take place before it passes into Communal history, just as developments of Communal history take place before passing into National history. These modifications of a natural family are due chiefly to the extreme quarrelsomeness of the little groups, and then, as a consequence of this, to the rise of various customs of marriage differing from the most primitive of all, monogamy.

The warfare of this period answers to what Lord Bacon calls the highest trial of right, when states, that acknowledge no superior on earth, put themselves upon the justice of God for the deciding of their controversies. It was the highest trial of right among independent communities for power and leadership. Sir Henry Maine quotes Von Maurer as an authority for asserting that the great cause of one family gaining power over another, was the frequency of intertribal war;* but Mr. Spencer puts this, perhaps, in a more general light. An important benefit, he says, bequeathed by war has been the formation of large societies. By force alone were small nomadic hordes welded into large tribes; by force alone were large tribes welded into nations; by force alone have small nations been welded into large nations.† The God of war is looked upon as the God of justice, might rules as the equivalent, the incarnation, of right, so far as regards the relationship between the independent units, who have no common superior to be governed by, and who have not anything answering to the public opinion—the positive morality or International Law—of later and modern times. And this gradually varies the social notions

* *Village Communities*, p. 142.

† *Study of Sociology*, p. 195; also *vide*, page 193 and *Prin. of Soc.*, i., 540.

within the independent units. Instead of the natural household of parents and offspring, we have something more than this—something more, though still retaining the original nucleus. The parent-chiefs captured other women for their wives, other people for their slaves. The first caused a more extensive natural offspring,* and a corresponding relaxation of the natural affection for children (Montesquieu xvi., 6), and opened the way for the adoption of stranger children as members of the family; the second caused a greater degree of despotism in the chiefs; and both, in the end, had the effect of considerably raising the numerical force of the primitive family groups. This numerical force had great means of increasing, besides the one which marks a later stage of social progress, the aggregation of independent tribes. A powerful family chief would always be the centre to which people of less power and consequence would attach themselves. These weaker strangers will be the more closely attached to the house, and the more a part of its possessions, the more independently each house exists for itself alone, and the more exclusive its dependence on the paternal authority. Professor Ewald traces out this idea with reference to the famous example of patriarchal chieftainship and its corresponding society indicated by the story of Abraham; and I place in a note the several stages of this submission to human authority, which that eminent author has detected in the Biblical narrative.† Again, there must have been some cohesion on the death of a parent

* Vide Ewald's *Antiq. of Israel*, pp. 207-8. Nothing is more alien to those days than prudish and melancholy views in regard to marriage and children. This shows itself most in the custom of marriage by the brother-in-law (the *leviratus*). I quote this as evidence of the desire to beget offspring, not, of course, in regard to the custom of polygamous marriages implied in the text.

† I arrange Professor Ewald's notes on this subject under the following progressive heads:—1. Prisoners of war. 2. Human robbery. 3. Moral turpitude. 4. Debtors, when the individual houses were united in the higher organisation of aggregated communities; and after this important epoch follow, 5. Sale of children. 6. Homeborn children of slaves. It is with the first three that the text deals. Ewald's *Antiq.*, p. 210 and Notes. See also a parallel

chief, the tribe did not at once split up and separate; and we have some clue to this in the expression of the Divine vengeance extending to the fifth generation and its parallel of human vengeance among the Bedouins.* It is easy to conclude from this that it became the object and pride of the chiefs to possess a numerous following, even as in Europe princely splendour and greatness was measured among the Gallic tribes whom Cæsar conquered, not by extent of territory, but by the multitude of the population.†

The term "family," then, as applied to this early period of man's history, has to be modified to take in the facts I have just enumerated, and to meet this modification the term "patriarchal family" is generally adopted. The key note to its existence is the evidence of primitive marriage customs; and though Mr. Morgan's gigantic work, published under the auspices of the Smithsonian Institute, undertakes to prove that the earliest form of marriage was unconditional promiscuity—if that may be termed marriage, for want of another word—and that marriage between single pairs originated just on the borderland of civilisation, yet I am inclined to believe that Mr. Spencer's arguments in favour of monogamy being the first form of marital relationship cannot be well disputed.‡ Around the nucleus thus formed clustered the subsequent influences just mentioned, and in this form we shall meet it on the broad surface of universal history, a group of men and women, children and slaves, of animate and inanimate property, all con-

case in Tacitus, Germ., 14, *Si civitas, in qua orti sunt, longa pace et otio torpeat, &c.*

* Ewald's Antiq., 168-9. According to Gen., i., 23, it would seem that five generations were the utmost that could be thought of as living together with the father of the race or his sons.

† Hampson's *Origines Patriciæ*, p. 54. See Tacitus, Germ., 39, as to the number and greatness of the Semnones.

‡ Prin. of Soc., i., p. 698-9, 704. Mr. Spencer does not mention the American authority alluded to in the text, though Mr. McLennan receives a whole chapter of criticism to himself.

nected together by common subjection to the Paternal Power of the chief of the Household.*

When we remember that with the Communal period commences also man's settlement on land, while the patriarchal period is one of pure nomadism, it will be understood that the examples from independent sources, that is, from existing types of mankind, are not altogether capable of systematic grouping. But the science of Sociology has attempted this. We meet with types of the most fully developed patriarchal families in North America among the Comanches, the Dakotahs, the Iroquois, and others.† We meet with types of the most primordial society, that of simple families independent of each other, in the Wood-Veddahs who roam about in pairs, the Bushmen wandering about in families, the Fuegians in clusters of a dozen or more, and tribes of Australians and Andamanese within the limits of twenty to fifty.‡ But, not to weary the reader with multiplication of examples, we think we have warrant for saying that primitive man, who, before any arts of life were developed, necessarily lived on wild food implying wide dispersion of small numbers, was not much habituated to associated life.||

We have thus seen how far history takes us back into the social life of man—even to the very border of his first step in the way of progress. During the course of this inquiry, also, we have perceived three distinct epochs, standing out above all others, in the history of sovereignty. We find, in other words, that a Communal Sovereignty and a Patriarchal Sovereignty answered, each in its own time and place and with all its own special surroundings, to modern sovereignty in modern civilised countries. It is the special fact of Patriarchal Sovereignty to which I would direct attention; for, in ascertaining its place in the great

* Village Communities, page 15.

† Prin. of Soc., i., 485.

‡ Prin. of Soc., i., 482; and Pritchard's Physical Hist. of Mankind, i., 178.

|| Prin. of Soc., i., 71.

unity of history, we establish what is perhaps of equal or greater importance, the continuity of the fact of sovereignty among the institutions of the human race, dating back from a period which has hitherto not been investigated by historical jurists.

II.

We have now to deal with the second portion of our subject, the internal regulations of this patriarchal family—*i.e.*, the internal regulations so far as law and sovereignty are concerned.

It is, of course, the well-known *patria potestas* of later times which is typical of the law and sovereignty of this period. The universal traces of its existence among barbarians as well as civilised people, among ancient as well as modern nations, give evidence of its primordial origin before the separation of mankind into races. We meet with it everywhere, in forms varying in detail from each other, but still having common features. It is, of course, known to all students of Roman law, which has supplied a terminology for the whole of history, from the vigorous and unbending character of its own form of this power, which received in legislation an unalterable shape and absolutely guided and governed the Roman household without any special authority from, or responsibility to, the State.* To turn to other great nations of antiquity, we find that Sir Gardner Wilkinson has examined this subject with reference to the Egyptians, and his views are thoroughly conclusive as to the existence of a despotical paternal power among them;† a tablet of primitive Accadian laws, published in the third volume of "*Records of the Past*," from a translation by

* The best authorities are Inst. of Gaius, i., 55; Sir H. Maine's *Anc. Law*, *passim*; Mackenzie's *Roman Law*, 143; Mommsen's *Rome*, i., 60. Its occurrence in the Twelve Tables is not proof that it was the result of legislation, but rather that legislation adopted what was already existing. See, for evidence of this, the law which modifies the power of the father, Tab. iv., sec. iii.

† *Anc. Egyptians*, ii., 38.

Mr. Sayce, gives similar evidence with reference to the Eastern nations ; among the Greeks, also, and the Teutonic invaders of Rome, we can trace a corresponding form. Even in modern civilised countries, though the power of the father is much modified, having passed to the State, there still exist undeniable proofs of its despotic origin ; and in Russia at the present day, a married son does not establish a separate household as long as the head of the family is living.*

Now, such a *régime* is only capable of one origin. Like the aggregation of families, it was rather the result of history than the product of brilliant statesmanship. And this history is primæval : it belongs to the same period, corresponds to the same social institution, as patriarchal independent families and patriarchal sovereignty. Fortunately, we possess some indications of this. One of our greatest *à priori* writers distinctly perceives that a society is practically incapable of making any progress until it has learnt to obey ;† and transferring this to the domain of sociology, we have a chain of historical evidence to prove that, be the course of submission what it may, a relatively subordinate nature is everywhere shown by men composing social groups ;‡ which, by the light of our previous researches, would be, in the first instance, the outcome of the obedience of children and slaves to a father, or father chieftain.

It now remains for us to summarize the result of our historical researches, and apply it to the question before us. First, then, we have three distinct epochs in the life of social man—epochs which now and again overlap each other, but which, nevertheless, are plainly discernible on the pages which record man's progress. These three

* Rev. J. Long's *Village Communities in India and Russia*, Appendix B. The laws of Massachusetts assigned the penalty of death to all stubborn and rebellious sons. Taylor's *Words and Places*, p. 16.

† J. S. Mill's *Rep. Gov.*, p. 37

‡ Spencer's *Prin. of Soc.*, i., 69, 70.

epochs are, or may be, termed (1) the patriarchal, (2) the period of aggregated patriarchal units, (3) modern civilised society. To these three social epochs correspond three stages of sovereignty which I term (1) patriarchal, (2) corporate assembly of patriarchal chiefs, (3) modern sovereignty, whether corporate or individual. To complete this summary, we have the following general conclusions, (1) that, in the first epoch and the last, law is, for all practical purposes, identical with the power of the sovereign, and (2) that in the second period a body of customary rules exists which do not enter into the jurisdiction of the sovereign body, but which, nevertheless, help to govern the community.

It must here be noted that parental law and modern law do not tally in form, though they do in political relationship. Parental law is what Austin would designate "occasional or particular commands," which is something less than his general definition of law. But this is only an early phase in the history of law, which cannot be divorced from later phases by any deficiency of terminology. Each command was promulgated, not to meet possible breaches in the future, but to settle present disputes; each command was spoken directly by the sovereign, and did not apply by analogy to any other series of cases; it was, in fact, judicial rather than legislative. But, after all, it is not in reference to its form that we are now discussing it, but with reference to its relationship to the sovereign; and in this last aspect we find nothing to preclude us from pronouncing that the most primitive and most recent law can be defined as identical with the coercive force of the sovereign.

This conclusion is of more value than at first sight would appear to be the case, when we understand the political significance of the additional historical epoch in the history of law, which I have attempted to establish in the period of the independent patriarchal family. The patriarchal family is by no means unknown to historical jurists, and

Sir Henry Maine, above all others almost, appears to have an appreciation of its value in the history of sovereignty, but an appreciation, I venture to think, which is trammelled by the remembrance of the absurd use made of it by Filmer.* It appears to me that its position in history has not yet been thoroughly investigated. Whenever the Patriarchal Family appears in the writings of jurists and Historians, it appears as a member of an aggregated community, not as an independent society; and though Austin assumes the existence of a social unit, which almost coincides with one phase of the patriarchal unit I am dealing with, it is exactly at this stage of society that Austin denies the existence of sovereignty, denies the application of the term political society, denies that natural offspring may be termed subjects. Here history steps in however and confirms, what before theory only vaguely asserted, and more vaguely in the case of Austin than of Hobbes or Bentham. It declares patriarchal society to be an ascertained epoch of human life; and parental law and parental sovereignty to have begun the history of law and sovereignty. If, in addition to this, we may calculate its original undeveloped duration by a geological rather than a historical standard (and such researches as those of Mr. Fiske's Cosmic Philosophy go far to confirm the investigations of natural scientists); if this form of power has not yet spent its influence upon us; if it is one of the facts with which the Western World will some day assuredly have to reckon, that the *political* ideas of so large a portion of

* For instance, at p. 386 of *Early Institutions*, we have the following remarkable passage:—"The most nearly universal fact which can be asserted respecting the origin of political communities called states, is that they were formed by the coalescence of groups, the original group having been in no case smaller than the patriarchal family." Now this is exactly the state of things which points to the original independence of the patriarchal family; but Sir H. Maine does not proceed to investigate the circumstances of this independence, but rejects it from his argument on the score of Austin's appeal to the ridiculous.

the human race are inextricably bound up with the notions of family interdependency and of natural subjection to patriarchal power;* then, the denial of the title of political on analytical grounds will not interfere with the historical establishment of a political influence, unknown to any other form of law or any other form of sovereign power.

We get rid of any remaining difficulty under this head by the application of the principle which has throughout guided the present discussion of our subject. I mean the continuity, as well as the unity of history, *i.e.*, the unbroken series of influences which has attended each successive stage of man's development. Thus the identification of law with the coercive force of the sovereign, as a tolerably accurate definition of the conception of law, admits of historical proof, because the development of this maxim travels along a path which commences and ends with this identification. It is not so much that any intervening period interrupts the flow of this political conception, but that it does not interrupt it sufficiently to stamp it out.

Before concluding this paper I will endeavour briefly to show the effect of the line of thought which I have adopted upon the middle period, as a period of opposition to the definition. It will be remembered that I took Sir Henry Maine's Indian example as a type of this period, and in order to defend this course we will proceed to consider it more fully. Now the sovereign power of the Sikh chief, and the customary law of the dependent communities are clearly not identical, except by the application of the maxim, what the sovereign permits he commands. But whence the reason of this? Simply that the state of affairs exhibited in this Indian Province is a transition state from one stage of sovereignty to another. We have originally the communal Government administered by domestic tribunals, which is the distinctive form of Government

* Early Institutions p. 2, also Anc. Law, p. 134.

belonging to the period. But placed, as it were, on the top of this system, without any attempt to weld the incongruity into something like homogeneousness, is the fully developed form of a much later system. The Sikhs, who obtained the sovereignty of the Punjaub, were themselves reduced to subjection by a single chieftain belonging to their order, Runjeet Singh.

This Runjeet Singh is the sovereign whom Sir Henry Maine chooses as a type of the opposition of history to the definition of law given by the Analytical Jurists. I doubt, he says, whether once, in all his life, he issued a command which Austin would call a law. But this was only because this sovereignty was not the outcome of the people, was not the index to the progress or position of the State.* The sovereign chief issued commands for his personal aggrandisement; the domestic tribunals administered the rules which governed the intercourse of a member of one family with the member of another family, an intercourse which does not enter into the political questions of the time, an intercourse which the despotal chief has nothing whatever to do with, and cares nothing whatever about. But if, on the other hand, these domestic tribunals be recognised as a portion of the sovereignty of the people (and I cannot conceive any reason why this should not be the case, for they occupy the position of the national council common to all modern sovereignties), then it is plainly evident that the opposition ceases.

But there is another way of guiding us to the true estimate of this opposition; a way which does not depend upon a matter of opinion or argument, as does the suggestion I have just thrown out. I mean, of course, the consideration of the position that the Sikh sovereign occupies

* That sovereignty, when fully recognised as a portion of the State, should and does, reflect the condition of the people, both Mr. Mill and Mr. Spencer assert. See Mill's *Rep. Govt.*, p. 79, and Spencer's *Study of Sociology*, p. 398. See also a passage in Montesquieu's *Esprit des Loix*, Bk. I, cap. iii.

in the history of sovereignty. As I have before stated it is one of transition. I do not mean to say that the sovereignty of the Punjaub itself passed into any succeeding stage, for the whole of India exhibits a state of society to which Sir Henry Maine has very aptly applied the idea of crystallization. But in Aryan history we meet not only with other exact parallels to the Indian Sikh chief, but also with the stages of subsequent development into modern sovereignty. We find an instance in our own Anglo-Saxon history, wherein, from the very earliest times, we can see the process of centralization going on. One family gave way to another family, one village community to another village community, one state to another state, until we finally arrive at a King of the English, and a Bretwalda of Imperial Britain. The uprooting of the old communities was necessary, says Mr. Freeman, if England was ever to become a great and united nation.* And this uprooting took place gradually. We find, first of all, seven different kingdoms in England, each king having done exactly what Runjeet Singh did, and, obtained the sovereignty over his own people, though the national council still administered domestic matters. Then, one kingdom after another was conquered by victorious Wessex, and, finally, we have a king of the English, *i.e.*, a king who was immediate ruler over his own state, and superior lord over the conquered kingdoms.† This same process went on towards its final stage when the sovereignty of the period was represented by the Bretwalda. Both Alfred and Edward became supreme sovereigns of Britain, but it was reserved for the glorious Ethelstan to

* Norm. Conq., i, 104.

† As a proof of the local independence of the English tribes, Mr. Freeman has the following passage referring to so late a date as A.D. 999 :—"It is also probable, that in a country which was still so imperfectly united, one part of the kingdom did not greatly care for the misfortunes of another. The devastation of Kent and Wessex would not cause any very deep sorrow or alarm to the Danish people of Northumberland. Local resistance was always possible." Norm. Conq., i., 325. Also *ibid.*, 351, the example of Ulfcytel.

finally bring this supremacy to a decided issue. He became immediate King of all the Teutonic races in Britain, and superior Lord of all the Celtic principalities,* and in this position the sovereignty of Britain occupied a parallel position to the sovereignty of the Punjaub. The sovereignty of Britain, however, went on developing, while the sovereignty of the Punjaub remained stationary, or rather was wiped out by external conquest. I have now stated my case; and it does not appear to me that a period in the history of sovereignty, which is so clearly a transition period, can be adduced, with any amount of reason, as a period which is capable of giving evidence, either one way or another, as to the general definition of the attributes of sovereignty.

Looking once more at the whole question, what additional light may the present inquiry be said to have thrown on the history of law and sovereignty in their political relationship to each other? It has, first of all, established a chapter in this history which before had not been adequately recognized by historical jurists—a chapter ready to be written from materials well known to be in existence but which had strangely passed out of notice. In the field of the history of Law, no one has shown a clearer appreciation than Sir Henry Maine of the vast importance of parental law (*patria potestas*); no one has placed this importance in so clear a light; no one has established for it so early an historical existence. He places the conception of custom posterior to that of Themistes or Judgments (Anc. Law. 5); he places the Themistes posterior to a despotic father's command (ibid. 125); and of the patriarchal family, within which resided the despotical parental law, he says it will be found to have stamped itself on all the great departments of jurisprudence, and may be detected as the true source of many of their most important and most durable characteristics (ibid. 134). Now, this is not only establishing an early, but a continuous history. But to correspond to these

* Freeman's Norm. Conq., i., 62.

phases in the history of Law, there must be phases in the history of sovereignty, travelling along the same path, having the same influences, ending at the same goal. For, Sir Henry Maine himself holds that the duty of inquiry, if not how sovereignty arose, at all events through what stages it has passed, is indispensable to the history of Law.* It is only thus, he adds, that we can assure ourselves in what degree the results of the Austinian analysis tally with facts.

In the first place, then, we have the patriarchal stage. Here the making a law, the putting it into force, the punishing for a breach, are all resident in the patriarchal sovereign. He is at once the law-giver, the judge, and the executioner. The identification between the coercive power of the sovereign and the law is therefore complete.

In the next place, we have the communal stage. The most nearly universal fact, says Sir Henry Maine, which can be asserted respecting the origin of the political communities called states, is that they were formed by the coalescence of groups, the original group having been in no case smaller than the patriarchal family.† It is, therefore, perceivable that, though other political notions must creep up to govern this new associated group, the underlying current of legal ideas—of ideas of law and sovereignty—still continues the same as at the first period, with respect to individual man. The individual is governed by *patria potestas*, though the corporate unit guides itself, with reference to other corporate units, by custom.

In the third place, we have the modern stage. Here the Analytical Jurists have been able to detect the identification of law with the coercive force of the sovereign. The historian has to show how the barriers which separated individual man from individual man have one by one been removed, and that now, as in the first stage, the sovereign and the subject stand face to face as governor and governed.

The degree to which the results of the Austinian analysis

* Early Inst., p. 357.

† Early Inst., p. 386.

tally with facts is, therefore, of such a magnitude, that little or no opposition can be found to them in history, with reference to the question now before us. History commences with the fact of law being identical with the power of the sovereign, continues with it in the undercurrent of political thought, and finally ends with it as an observed ostensible fact. It is no more possible to detach from its surrounding history any particular example of sovereignty and offer it up for opposition, in its isolated form, to the Austinian definition of law and sovereignty, than it is possible to make the mathematical assertion that a part is equal to its whole. If we replace Sir Henry Maine's example in the niche from whence he took it, we shall find, as I have endeavoured to show, that it fits closely, in its own time and place, into that great system to which it belongs. We shall find that it has relations with early systems and with later systems, and all these ramifications of the subject must be considered and investigated before admitting its value for the important function of serving as an example to be used in considering a question which belongs, not to an isolated period, but to the whole realm of man's history.

G. LAURENCE GOMME.



V.—A NEW INDEX TO THE STATUTE LAW: A FRESH STEP TOWARDS A CODE.

WE are glad to be able to lay before our readers indubitable evidence that the work of codification is passing out of the region of theory into the domain of fact. And one of the most encouraging features in the case is that high Parliamentary officials, as well as distinguished scientific Jurists, have taken up the question and made it their own. There has already been issued, in conjunction with the Revised Statutes, still in course of publication, a "Chronological Table and Index to the Statutes," down to the close of the Session of 1874. There is now in preparation, for the volume to be published next year, a far more extensive undertaking, worthy to be called, in the apt language of the Parliamentary Counsel, "a detailed plan for a Code." It is no secret, we believe, that Sir Henry Thring has long had such a work in contemplation, and a perusal of his "Instructions," which we print with the relative specimens, will show the accuracy, the care, and the thoughtful mapping out of the field with which he has prepared the way for its successful accomplishment. Acting in concert with, and under the direction of the Statute Law Committee, comprising, besides himself, Sir J. G. Shaw Lefevre, Sir T. Erskine May, Sir H. Sumner Maine, and other well-known men, Sir Henry Thring has caused specimens of an Index to be drawn up, in accordance with his "Instructions," by Mr. Charles Sumner Maine, and Mr. Gerald A. R. Fitzgerald, the former taking the title "Coroner," and the latter "Public Health." These specimens, revised and amended by the Committee, we also print, for they have an intrinsic value apart from that which belongs to them as a decided step

towards a Code. Such work is, indeed, an indispensable preliminary, and those members of the legal profession who may be employed upon it may rest assured that the most thoughtful and eminent leaders of the Bar and the Senate will re-echo the wise words with which Sir Henry Thring concludes his Instructions: "Next to Codification, the most difficult task that can be accomplished is to prepare a detailed plan for a Code, as distinct from the easy task of devising a theoretical system of codification. Now, the preparation of an Index such as has been suggested in the Instructions, *is the preparation of a detailed plan for a Code*. Each effective title is, in effect, a plan for the codification of the legal subject-matter grouped under that title, and *the whole Index, if completed, would be a summary of a Code arranged in alphabetical order*." It is proposed, we understand, that next year's edition of the Index to the Revised Edition of the Statutes shall contain about fifteen specimen titles, similar to those which have been prepared by Messrs. Maine and Fitzgerald, or so many as the very limited sum at the disposal of the Committee, not more than £200, we believe, will admit. These titles will comprise, among others, the important subjects of Evidence, Public Health, Companies, Sheriffs, Coroner, Municipal Boroughs, Merchant Shipping, Justice of the Peace, Sessions, Ecclesiastical Commissioners, Lunacy, Post Office, and Railways. The names of the draftsmen are to be published in the preface to the work which, so far as those titles are concerned, will be substantially a new one, as anyone may judge for himself who takes the trouble to compare the titles "Coroner" and "Public Health," in the Index of 1874, with the chronological and analytical Indices elaborated by Mr. C. S. Maine and Mr. G. A. R. Fitzgerald. This valuable work has been excellently begun and under the most favourable auspices; it is earnestly to be hoped that Parliament will exercise a fitting liberality in its grants,

so as to help forward the completion of a monument "ære perennius."

INSTRUCTIONS FOR INDEX TO THE STATUTE LAW.

The basis of an index to a book of the ordinary kind is a series of titles or catch-words arranged in alphabetical order and indicative of the main topics treated of in the book.

Of these titles a certain number, which may be called effective titles, have underwritten a list of referential explanations of the subject-matter comprised under the description of the title, marking the sub-divisions of that subject-matter and the pages of the book in which each subdivision is to be found. The sub-divisions are, in important cases, grouped under separate headings and sub-headings adapted to classify the generality of the subject-matter described by the titles, and to facilitate the finding the separate references.

Titles which have underwritten references only to effective titles may be called cross titles. Their use is to lead the inquirer to the effective title under which the required information is to be found, it being impossible to select the effective titles in such a manner as to suit the varying ideas of inquirers as to the catch-word which most aptly includes a large group of references.

Taking the accompanying specimen Index, "Public Health," as an example; "Public Health," is the effective title; "Health, Public," "Local Board," "Local Government," and so forth, are the cross titles; "Sanitary Powers and Duties," and so forth, are headings; "sewage, &c." "water," and so forth, are sub-headings; while the explanations under the sub-headings are the references.

This nomenclature will be always observed in these Instructions.

The object of an index is to indicate the place in a book or collection of books in which particular information is to be found. Such an index is perfect in proportion as it is concise in expression, whilst exhaustive in its indication of every important topic of the subject to which it is an index.

Applying the foregoing nomenclature and the foregoing principles to an index to the Statute Law, it will be obvious that such an index differs in some important particulars from an index to an ordinary book.

First, it is not an index to a book, but an index to a collection of books.

Secondly, the volumes of the Statute Law do not form separate books to be indexed, but contain, as it were, a number of books or statutes which require in a greater or less degree to be separately indexed. The effective titles then of an index to the Statute Law may be considered each as a separate index to a separate book, the subject-matter of the book being the statute or series of statutes containing the enactments relating to the subject-matter covered by the effective title.

Thirdly, the indexing under an effective title the subject-matter of a variety of statutes involves two processes :—

- (1.) The arrangement of the subject-matter, and, consequently, the determination of the meaning of the statutes to be indexed ; and
- (2.) The finding appropriate referential expressions to the matter so arranged.

Of these processes, the first, the arrangement in effect of the book, is in the case of an ordinary book performed by the author, while in the case of the Statute Law it must be performed by the index-maker, wherever the subject is complicated. In short, where an effective title deals with law which has not been scientifically consolidated, the index-maker assumes in a great measure the character of a writer, and must investigate the subject with the same care, and distribute the matter under appropriate heads with the same attention, as would be required if he were composing a treatise on the law to which such title relates, or were the draftsman of a bill consolidating that law.

The general scheme of an index to the Statute Book is to group under comparatively few effective titles the whole of the Statute Law, and to refer by cross titles to the sub-divisions of that Statute Law as found under the proper effective titles.

The selection and limitation of the particular subject-matter to be indexed under a particular effective title is a matter requiring careful consideration. As a rule, subjects which have usually been grouped together in the same Act or series of Acts should be arranged under the same effective title. For example, the enactments found in the Merchant Shipping Act, 1854, and its amending Acts, will be indexed under the head "Merchant Shipping," although those enactments contain provisions which logically would not find a place under that title. For the same cause, provisions falling properly under the heading "Local Government" have been directed to be indexed in the specimen index under "Public Health."

The reason for this arrangement is that practical convenience

has been preferred to logical or scientific accuracy, and the fact that certain provisions have for a long time formed part of the same Acts or series of Acts is sufficient evidence, for the present purposes of an index, that such provisions have a practical although they may not have a logical relation to each other.*

On the other hand, the index-maker must not slavishly adhere to the arrangement of any particular Act or series of Acts, but must look on the whole group of enactments bearing on the same subject as constituting a statute, to be indexed under the same title, but not at all of necessity in the order in which the provisions may be found in the Statute Book.

The logical imperfections of any practical arrangement of a large subject-matter under an effective title will be remedied by a careful adaptation of cross titles. For example, under the cross-heading "Local Government" may be found a reference to the provisions on that subject indexed under "Public Health."

When the subject-matter of an effective title is determined, the mode of expressing that title is to be considered. The object here is to use the most popular title which will designate the subject-matter referred to. Other things being equal, a title consisting of a noun or beginning with a noun substantive, should be preferred.

The cross-titles will refer either to the whole of an effective title or to specified portions of the enactments found under that title. The function of these cross-titles is sometimes, as before observed, to indicate that a certain subject-matter, which would naturally be indexed under the cross-title itself, is indexed under some heading or sub-divisions of a particular effective title. At other times, cross-titles are merely synonyms for effective titles, *e.g.*, "Health," for "Public Health," and so forth. The same subject-matter will sometimes form an effective title of itself, and also a heading or sub-heading under another effective title, *e.g.*, "Highways" will be an effective title of itself, while it will also form a heading or sub-heading under "Public Health."

In such a case, two courses are open. The enactments of the Public Health Act relating to highways may be indexed under "Highways," with a cross-reference under the title "Public Health," or *vice versa*. The more logical course certainly is to

* To group the index under proper effective titles would in effect be to distribute the Statute Law into the complete form of a code. Such a form can only be reached by successive stages of improvement which it must take some years to complete

follow the law rather than the authority that administers the law ; in other words, to put the above enactments under "Highways" rather than under "Public Health," and where the same index-maker has both titles under his superintendence, he can use his discretion in the matter. It will be found, however, that in the specimen index these provisions, being included in the enactments relating to Local Government, are grouped under "Public Health," and it is intended that there should be a cross-reference to "Public Health" under "Highways." The reason for adopting this mode of grouping is, as has been stated above, first, the desirability of adhering to the practice of Parliament in grouping the subject together in the same Act, and, secondly, the practical difficulty of distributing amongst different index-makers legal subject-matter which the Legislature has placed in the same Act or series of Acts. Similar observations apply to "Lighting Streets," "Public Pleasure Grounds," "Markets," "Slaughter-houses," and other similar enactments of the Public Health Act.

The question arises here as to the repetition of matter under two or more titles, *e.g.*, under "Public Health" there will be found a reference "Definition of nuisances, 38 and 39 Vict., c. 55, s. 91." Again, under the title of "Animals," there will be found a reference "Restrictions on keeping so as to be injurious to health, 38 and 39 Vict., c. 55, ss. 44, 47, and 91." Now comparing these two references, it will be found that the latter is partially included in the former. The repetition is made designedly, because if it were not made it would be necessary to set out a statement under the "Public Health" title, "Definition of Nuisance," that "Nuisance" includes animals improperly kept, and then to place under the title "Animals," a cross-reference to that statement. The reason for not introducing "Animals" under the reference to "Nuisances" is, that animals improperly kept are only one of many specified nuisances, all of which it is unnecessary to particularise, and further, that there are provisions relating to animals so kept in the Public Health Act which do not fall under the heading Nuisances.

Such cases as the above frequently occur, and must be left to the discretion of the index-maker. Where the law can be more concisely and clearly explained by being partially distributed under two or more titles, such distribution should take place, and *vice versa*. The end to be borne in mind is what course will render most aid to an inquirer in search after a particular enactment.

The effective title will be followed by a list of the statutes, the enactments of which are indexed under that title. The statutes, as shown in the specimen index, "Coroner," will be accompanied, wherever possible, by a slight indication of the distinctive characteristic of each statute.

The subject-matter of an effective title being thus settled, the next step is to arrange the contents of the several statutes constituting that subject-matter, and the consideration of the best mode of arrangement leads to an inquiry into the structure and component parts of Acts of Parliament.

In a complex subject such as that of Public Health, the enactments admit of successive siftings or classifications, which, if carried into effect with care and patience, reduce the matter to such a form as will greatly facilitate the selection of headings and sub-headings, and the distribution of the group of references under their respective headings and sub-headings, a distribution on which the excellence of an index greatly depends.*

The first operation is a very general one. It consists in setting aside by itself all matter extraneous to the main purport of the statute. This matter comprises, as a rule, temporary provisions; repeals, general savings, and particularly local or other exceptional provisions.

To take examples from the Public Health Act. The temporary provisions are in that Act rightly placed in Part X. by themselves. Frequently, however, they will be found unskilfully mixed up with the permanent provisions, and must then be picked out by the index-maker. As a general rule temporary provisions will not require to be indexed at all.

Similarly, repeals and savings appear in a separate part in the Public Health Act, but similar observations to those that have been made with respect to temporary provisions will apply to them also.

* Frequently the subject-matter of a law is simple and not complex. For instance, "Coroner" is an example of a title relating solely to the functions of an administrative officer. The same observations would apply to "Sheriff" as a title. Illustrations of Acts declaring the law alone will at once be found in almost any criminal Act. "Municipal Boroughs" may be considered as falling under neither of the above categories, or may be classed as administrative bodies. In any of the above cases the rules will only be partially applicable, or not be applicable at all. Before, however, dispensing with the rules, the index-maker should be certain that he has under his view the whole subject-matter. Not seldom an Act which appears to be a distinct branch of law forms part only of a general head of law. For example, an Act defining the procedure for assessing or collecting rates is part only of the general law of rating, and should be so treated in the Index.

Local or exceptional provisions raise questions of greater difficulty, and must be left a good deal to the discretion of the index maker.

In almost every legal subject-matter it will be found that certain provisions occur which do not readily arrange themselves under the general headings. Their exceptional character sometimes consists in their being local, *e.g.*, in "CORONER," "Langbaugh," is a local provision; in "PUBLIC HEALTH," "Oxford and Cambridge," form exceptional provisions. Sometimes it consists in their applying to special districts, *e.g.*, "Port Sanitary Authority" under "PUBLIC HEALTH," or to a special class, as "Hop-pickers."

At other times, exceptional provisions refer to matters more remotely connected with the rest of the subject than the bulk of the provisions. A fit notice of such provisions is extremely important, inasmuch as from their very nature they form a class of enactments which it is very difficult for the inquirer to find out without a special reference, as he is at a loss where to look for them. If necessary, a general heading, such as "*Miscellaneous*," may be adopted.

The essential point is that the existence of every enactment which does not naturally group itself under a particular class of references should be specifically noticed.

The main body of the enactments will remain to be disposed of. Begin by dividing them into two general classes:—(1) Enactments declaring the law; (2) Enactments providing for the Administration of the law. Parts III. and IV. of the Public Health Act are law enactments, while Parts II., V., VI., VII., VIII., IX. are administrative provisions, or enactments auxiliary to administration.

The arrangement of these provisions in the index should so far deviate from that adopted in the Public Health Act, as to provide that the enactments that have been pointed out as laying down the law should precede the whole of the enactments relating to administration.

Part II. relating to districts and authorities, would thus follow Parts III. and IV.*

Two great groups, (1) the law, and (2) the administration of the law, will now have been arrived at. Let us take these groups, and see what further general rules can be applied.

A little examination will show that the enactments divide them-

* The reason for this arrangement will be found in "The Instructions for Draftsmen," issued by the Parliamentary Counsel.

selves into ordinary and supplemental provisions. The ordinary provisions are such enactments as are in all cases required to carry into effect the material objects of the Act. Supplemental provisions are framed with a view to supply vacancies in offices, defects in procedure, or to declare in detail the mode of carrying into effect legislative acts, the principles of which have been previously laid down.

Referring to the Public Health Act, in the law group the maintenance and making of sewers is an ordinary provision, the alteration and discontinuance of sewers is a supplemental provision. The best examples, however, of ordinary and supplemental provisions usually occur in the administrative group. Taking the Public Health Act, the sections in Part II. constituting districts and authorities are ordinary provisions, the sections in Part VIII. altering the areas of districts and referring to the formation of united districts are supplemental provisions.

A still better example is found in the Bankruptcy Act, 1869. The proceedings in bankruptcy detailed in the first three parts of the Act are ordinary provisions, as they are the enactments laying down the precise manner in which the proceedings in bankruptcy will be carried on if the creditors appoint a trustee and committee of inspection, and if no vacancy occurs either in the office of trustee or committeeman, and generally if every step be taken in due time and in a legal manner, while the provisions in the fourth part of the Act are supplemental provisions, inasmuch as they declare what is to be done in the event of the failure of any link in the regular chain of legal action, or else supply working details which by reason of their raising no question of principle were omitted in the former part of the Act.

The arrangement of the ordinary and supplemental provisions, where it is necessary to index them separately, should be as follows : The ordinary should precede the supplemental, but they should not be arranged in separate parts, as is usually done in Acts of Parliament, for it will be better in an index that the supplemental provisions applicable to a particular matter should immediately follow the ordinary provisions relating to the same matter.

A point has now been arrived at at which a pause may be made for the purpose of observing the effect of the preceding operations. The framework of the title has been settled to a considerable degree, the arrangement being as follows :—

- (1.) Law :
- (2.) Administration :

(3.) Exceptional provisions :

(4.) Temporary provisions, savings, and repeals.

The index-maker must now turn his attention to selecting the headings and sub-headings, and to grouping the references under those headings and sub-headings.

Looking, with a view to sub-division, at the large group of enactments that, in the Public Health Act, will range themselves under Law and Administration, it will be found that they are capable of division into simple enactments and complex enactments.

A simple enactment is one in which the principle is contained in one section. A complex enactment consists of two classes of enactments, principal enactments, and subordinate enactments, of which the principal enactments are occupied in enunciating the law, the subordinate enactments in declaring the procedure by which the law is to be carried into effect. For example, in the Public Health Act, ss. 13-26 are simple enactments ; ss. 27-34 constitute a complex enactment, of which the power to dispose of the sewage is the principal enactment, the subordinate enactments being those which declare the mode of disposing of the sewage, by distributing it over land, and so forth. In indexing, the subordinate enactments will not usually require to be noticed separately, but, of course, where they are so noticed they will follow the principal enactment.

On the question of headings and sub-headings a very wide discretion must be left to the index-maker. As a general rule the headings should be but few, and should be very comprehensive, it being borne in mind that nothing is so likely to confuse an inquirer as to find a reference under a heading to which it does not belong, while even if the heading be too comprehensive the only result is that a little more trouble is given the inquirer in finding the reference which he seeks.

The same observations apply to the sub-headings, but with less force. The sub-headings, where used, should indicate the important divisions in the subject-matter of the heading under which they are found.

The references will in general consist of short notices of the various principal enactments, they will be arranged in the natural order of sequence where such order is apparent, and in other cases according to the order of time or of importance, or in such other method as the index-maker may think most appropriate.

These references will, in a complex subject, be grouped under separate headings and sub-headings, while in a simple subject such a division will frequently be unnecessary.

With respect to the number and particularity of the references no general rule can be laid down. The difficulty in framing references consists in finding generic expressions capable of including a sufficient number of enactments without being too vague. The index-maker must judge for himself how far he must guide the inquirer to a particular enactment by a 'special reference, having regard to the necessity of keeping his title within moderate compass, and in some degree to the question whether the subject-matter with which he is dealing is or is not of such general interest as to require a greater or less degree of minuteness in indexing.

A summary of the foregoing rules, with a few additional observations, may be given as follows :—

1. Title.

- (a.) *An effective title must generally (subject to the rule of preferring the popular title) begin with a noun substantive; cross titles will begin with a noun substantive or not, according to circumstances.*

2. Enumeration of Statutes.

- (b.) *If the Statutes are numerous they will be arranged in a double column, see "Coroner."*

3. Enactments relating to Law.

- (c.) *These enactments will be grouped, as a general rule, under headings and sub-headings. Principal enactments only, except in special cases, will be noticed separately, and several principal enactments, whenever the index-maker thinks it advisable, may be collected in one reference.*

Ordinary enactments will precede supplemental enactments.

References will as between themselves be arranged in the natural order of sequence where such order is apparent, and in other cases according to the order of time or of importance, or in such other method as the index-maker may think most appropriate.

4. Enactments relating to Administration of Law.

- (d.) *The directions in (c.) apply here also.*

With respect to the interior arrangement, so to speak, of the group, the simpler or lower authority will precede the higher or more complex authority, e.g., in the Public Health Act "sanitary authority" will precede the Local Government Board; in legal proceedings the court of first instance comes before the Court of Appeal, and so forth.

5. Local, special, or exceptional provisions.

(e.) *The above expression, or some part of it, will usually form a heading in the index of a complex subject-matter. The references will be arranged according to (c.)*

6. Temporary provisions; Repeals; Savings.

(f.) *Usually the above-mentioned provisions will not require to be indexed; when they do so require, one or more of the above expressions will form the heading.*

With respect to the composition of the index, references should whenever practicable be expressed by substantives or participles used as substantives.

The above rules can only be considered as general instructions, admitting of many exceptions. It must, however, not be forgotten that uniformity in the framework of an index is of great importance, as it enables the inquirer to look at once for the proper heading under which he will probably find the information of which he is in search.

There remains to be noticed an entirely distinct class of effective titles, which may be called collective titles. The object of such titles is to enable an inquirer to find under one title a number of independent facts collected from various statutes. For example, "districts" may possibly be selected as a collective title. Under such a title will be ranged "ecclesiastical districts," "highway districts," "sanitary districts," and so forth, with a reference to the Acts establishing such districts. The best arrangement here will be alphabetical, and the preceding rules as to the logical order of the enactments have no place. The object of such lists is to enable persons employed in Government offices, or in other official occupations, to perceive at a glance the statutes under which certain duties arise. The perfection of an index, so far as the collective titles are concerned, consists in the exhaustiveness of the enumeration of the particulars and the accuracy with which such particulars are associated with the enactments relating to them.

Collective titles will only be inserted in pursuance of special instructions.

A few words as to the mode of proceeding of a draftsman who undertakes to make an index to any legal subject-matter. His first step should be to make a list of all the statutes bearing on the subject; his second, to read the statutes through from beginning to end (striking out the repealed provisions as he proceeds), and by so doing, with the assistance, where required, of

text-books, to acquaint himself thoroughly with the whole of the statute law relating to the title of law on which he is occupied. A complete knowledge of the whole law is required before he begins to make the index, for until he can look down on the entire field of law before him, he cannot possibly judge of the proper arrangement of the headings, or of the relative importance of the various provisions.

When he has thus mastered the subject, he will construct his framework by selecting a title, and grouping under it the various headings. He will then proceed to work on the detailed references.

Having thus completed the work on his own plan, he will look through the general indices to the statutes to be found in the various editions and abridgements, and in the Index prepared under the direction of the House of Lords, with the view of ascertaining that he has omitted no particulars which ought to be introduced, but he will avoid consulting existing indices before beginning his work, except for the purpose of collecting his materials, as such indices are more likely to mislead than to assist in his arrangement of the subject-matter.

If he wish to look for precedents of arrangement, a good text book will generally supply the best material for reflection, but he must always bear in mind his obligation to conform to the rules above laid down for his guidance, so far as such rules are applicable, as the securing uniformity in the general arrangement of the headings by obedience to rules is of far more importance than the securing even a better arrangement of particular headings by disobedience to rules.

In conclusion, let no man imagine that the construction of an index to the Statute Law is a mere piece of mechanical drudgery, unworthy of the energy and ability of an accomplished lawyer. Next to codification, the most difficult task that can be accomplished is to prepare a detailed plan for a code, as distinct from the easy task of devising a theoretical system of codification. Now the preparation of an index, such as has been suggested in the above instructions, is the preparation of *a detailed plan for a code*. *Each effective title is, in effect, a plan for the codification of the legal subject-matter grouped under that title*, and the whole index, if completed, would be a summary of a code arranged in alphabetical order.

9th June, 1877.

HENRY THRING.

[** An Appendix containing minor details for the guidance of the draftsmen is omitted here.]

SPECIMEN INDEX TO THE STATUTE LAW.

CORONER. MR. C. S. MAINE.

This Specimen does not extend to Acts which relate only to Ireland.

CORONER :

- | | |
|---|--|
| 3 Edw. 1. c. 9. (Penalty). | 7 Will. 4. & 1. Vict. c. 64. (Durham). |
| 3 Edw. 1. c. 10. (Qualification). | 7 Will. 4. & 1 Vict. c. 68. (Expenses). |
| 4 Edw. 1. (Off. Cor.) (Inquest). | (E). |
| 25 Edw. 1. (Mag. Car.) c. 17. (Pleas of the Crown). | 6 & 7 Vict. c. 12. (Inquest). (E). |
| 28 Edw. 1. (Art. Rep. Car.) c. 3.* (Verge). | 6 & 7 Vict. c. 83. (Deputy and Inquisition). (E). |
| 14 Edw. 3. Stat. 1. c. 8. (Qualification). | 7 & 8 Vict. c. 92. (County Districts and Election). (E). |
| 28 Edw. 3. c. 6. (Election). | 8 & 9 Vict. c. 18. ss. 39, 40. (Lands Clauses). (E.I.) |
| 15 Rich. 2. c. 3. (Admiralty). | 16 & 17 Vict. c. 96. s. 19. (Hospital). |
| 3 Hen. 7. c. 2.† (Inquest). | 22 Vict. c. 33. (Procedure). (E). |
| 1 Hen. 8. c. 7. (Fees). | 22 & 23 Vict. c. 21. s. 40. (Recognition). (E). |
| 27 Hen. 8. c. 24. s. 10. (Royal Household). | 23 & 24 Vict. c. 116. (County Amendment of Law). (E). |
| 33 Hen. 8. c. 12. (Royal Household). | 28 & 29 Vict. c. 126 s. 48. (Prison). (E). |
| 25 Geo. 2. c. 29. (Fees and Removal). (E). | 31 & 32 Vict. c. 24. s. 5. (Capital Punishment). |
| 38 Geo. 3. c. 52. s. 4. (County of a City). (E). | 34 & 35 Vict. c. 78. s. 8. (Assessor). |
| 51 Geo. 3. c. 36. ss. 6-10. (Cinque Ports). | 35 & 36 Vict. c. 76. s. 50. (Coal Mines). |
| 4 Geo. 4. c. 52. (Felo de se). (E). | 35 & 36 Vict. c. 77. s. 22. (Metalliciferous Mines). |
| 6 Geo. 4. c. 50. ss. 52-53. (Jury). (E). | 36 & 37 Vict. c. 76. s. 5. (Railway). |
| 7 Geo. 4. c. 64. ss. 4-6. (Procedure). (E). | 36 & 37 Vict. c. 81. (Langbaugh). |
| 5 & 6 Will. 4. c. 76. ss. 62-64. (Borough). (E). | 37 & 38 Vict. c. 88. ss. 16-18, 20. (Registration. Burial). (E). |
| 6 & 7 Will. 4. c. 87. s. 16. (Ely). | 38 & 39 Vict. c. 17. s. 65. (Explosives). |
| 6 & 7 Will. 4. c. 89. (Medical Witnesses). (E. I.) | 38 & 39 Vict. c. 55. s. 143. (Public Health). (E). |
| 6 & 7 Will. 4. c. 105. s. 6. (Deputy). (E). | |

(1.) OFFICE.

(2.) INQUEST.

(3.) LOCAL AND SPECIAL.

(1.) OFFICE :

(a.) County :

| | | | | |
|--|-----|-----|-----------------|----------------------------------|
| Qualification | ... | ... | 3 Ed. 1. c. 10. | 14 Edw. 3. stat. 1. c. 8. |
| Election : | | | | |
| Electors | ... | ... | ... | { 28 Edw. 3 c. 6. |
| | | | | { 7 & 8 Vict. c. 92 s. 9. |
| Procedure | ... | ... | ... | { 7 & 8 Vict. c. 92. ss. 9-16. |
| | | | | { 23 & 24 Vict. c. 116. ss. 1-2. |
| Deputy | ... | ... | ... | 6 & 7 Vict. c. 83. s. 1. |
| Districts, division of county into | ... | ... | ... | 7 & 8 Vict. c. 92. ss. 1-7. |
| „ jurisdiction in | ... | ... | ... | 7 & 8 Vict. c. 92. ss. 19, 20. |
| „ residence in | ... | ... | ... | 7 & 8 Vict. c. 92. s. 6. |
| Detached parts of counties and powers of coroner for | ... | ... | ... | { 6 & 7 Vict. c. 12. s. 2. |
| | | | | { 7 & 8 Vict. c. 92. s. 8. |

* Stat. 3. in Ruffhead.

† Second para. of c. 1. in Ruffhead.

(b.) *Borough :*

| | |
|---|---------------------------------|
| Qualification, appointment, and general provisions | 5 & 6 Will. 4. c. 76. ss. 62-4. |
| Jurisdiction of county coroner in | 5 & 6 Will. 4. c. 76. ss. 62-4. |
| Deputy | 6 & 7 Will. 4. c. 105. s. 6. |
| Annual return to Secretary of State | 5 & 6 Will. 4. c. 76. s. 63. |

(c.) *Miscellaneous :*

| | |
|--|--------------------------------|
| Compelling to hold inquest | 23 & 24 Vict. c. 116 s. 5. |
| Removal by court on conviction | 25 Geo. 2. c. 29. s. 6. |
| „ by Lord Chancellor | 23 & 24 Vict. c. 116 s. 6. |
| Not to hold pleas of the Crown | 25 Edw. 1. c. 17. |
| Sheriff, counter rolls with | 3 Edw. 1. c. 10. |
| „ pay when acting for | 7 & 8 Vict. c. 92. s. 22. |
| „ disputed compensation where, } interested | 8 & 9 Vict. c. 18. ss. 39, 40. |
| Concealment of felony by coroner | 3 Edw. 1. c. 9. |
| Acting as attorney in prosecution forbidden | 7 & 8 Vict. c. 92. s. 18. |
| Non-attendance of juror on execution of writ } of enquiry | 6 Geo. 4. c. 50. s. 53. |

(2.) *INQUEST :*

| | |
|--|------------------------------|
| (a.) Holding of, and matters to be inquired into | 4 Edw. 1. 3 Hen. 7. c. 2.* |
| By Coroner only, within whose jurisdiction body lies dead | 6 & 7 Vict. c. 12. s. 1. |
| On death in prison | 28 & 29 Vict. c. 126. s. 48. |
| „ by execution in prison | 31 & 32 Vict. c. 24. s. 5. |
| „ from accident in coal mine | 35 & 36 Vict. c. 76. s. 60. |
| „ in metalliferous mine | 35 & 36 Vict. c. 79. s. 22. |
| „ connected with explosives | 38 & 39 Vict. c. 17. s. 65. |
| „ of lunatic in hospital or } licensed house | 16 & 17 Vict. c. 96. s. 19. |

(b.) *Procedure :*

| | |
|---|-----------------------------------|
| Jury : Choice of | 4 Edw. 1. 6 Geo. 4. c. 50. s. 52. |
| Attendance of | 7 & 8 Vict. c. 92. s. 17. |
| Inquisition | 4 Edw. 1. 3 Hen. 7. c. 2. |
| Return of | 7 Geo. 4. c. 64. ss. 4-6. |
| „ in county of a city or franchise | 38 Geo. 3. c. 52. s. 4. |
| Quashing of, for technical defects and } amendments of | 6 & 7 Vict. c. 83. s. 2. |
| As to evidence, recognisances | 7 Geo. 4. c. 64. s. 4. |
| Admission to bail of person charged with } manslaughter | 22 Vict. c. 33. ss. 1, 2. |
| Forfeited recognisances | 22 & 23 Vict. c. 21. s. 40. |
| Assessor in railway cases | 34 & 35 Vict. c. 78. s. 8. |
| Right of person indicted to have copies of } deposition | 22 Vict. c. 33. s. 3. |
| Post-mortem examination | 6 & 7 Will. 4. c. 89. |
| „ removal of corpse for | 38 & 39 Vict. c. 55. s. 143. |
| Burial, Certificate to be sent to registrar, } and order for | 37 & 38 Vict. c. 88. ss. 16, 17. |
| „ Where verdict of <i>felo de se</i> | 4 Geo. 4. c. 62. |

(c.) *Witnesses :*

| | |
|---|-----------------------------------|
| Compelling attendance of | 7 & 8 Vict. c. 92. |
| Medical : | |
| Attendance, fees, and general provisions | 6 & 7 Will. 4. c. 89. |
| Payment of fees | 7 Will. 4. & 1 Vict. c. 68. s. 2. |
| Recognisance to appear at assizes and give } evidence or prosecute | 7 Geo. 4. c. 64. ss. 4-6. |

* Stat. 3. in Ruff head.

(d.) *Expenses :*

| | | |
|--------------------------------------|---|---|
| Payment of, of inquest | { | 5 & 6 Will. 4. c. 76. s. 62. 7 Will. 4 & 1 Vict. c. 68. ss. 1, 2. 23 & 24 Vict. c. 116. s. 4. |
| „ „ in detached parts of counties | { | 7 & 8 Vict. c. 92. ss. 2, 3, 4 |
| „ in county when no inquest is taken | | 7 & 8 Vict. c. 92. s. 21. 3 Edw. 1. c. 10. 5 & 6 Will. 4. c. 76. s. 64. |
| Fees of coroner { | | 3 Hen. 7. c. 2., 7 Will. 4. & 1 Vict. c. 68. ss. 1, 3. 1 Hen. 8. c. 7. 23 & 24 Vict. c. 116. s. 3. |
| „ „ when acting for sheriff | | 7 & 8 Vict. c. 92. s. 22. |
| „ „ for taking bail | | 22 Vict. c. 33. |
| Payment in county by salary | | 23 & 24 Vict. c. 116. s. 4. |
| Accounts, and fund for payment | { | 7 Will. 4. & 1 Vict. c. 68. s. 3. 23 & 24 Vict. c. 116. s. 4. |

(3.) LOCAL AND SPECIAL:

| | |
|--|---|
| Admiralty | 15 Rich. 2. c. 3. 6 & 7 Vict. c. 12. |
| Chester | 23 & 24 Vict. c. 116. s. 7. |
| Cinque Ports | 51 Geo. 3. c. 36. ss. 6-10. 7 & 8 Vict. c. 92. s. 26. |
| Durham | 7 Will. 4. & 1 Vict. c. 64. |
| Ely, Isle of... .. | 6 & 7 Will. 4. c. 87. s. 16. |
| Langbaugh, Wapentake of | 36 & 37 Vict. c. 81. |
| Lincoln and York | 7 & 8 Vict. c. 92. s. 28. |
| London and Southwark | 25 Geo. 2. c. 29. 7 & 8 Vict. c. 92. s. 25. |
| Royal Household | 27 Hen. 8. c. 24. s. 10. 33 Hen. 8. c. 12. |
| Verge | 28 Ed. 1. c. 3.* |
| Coroners of Admiralty, Royal Household, Verge, Cinque Ports, London and South- wark, and certain Boroughs and Franchises { | 25 Geo. 2. c. 29. 7 & 8 Vict. c. 92. s. 25. |
| (Fees) | |

CROSS TITLES.

A.

ADMIRALTY, Coroner. *See* CORONER (3.)ASSESSOR, at Coroner's inquest. *See* CORONER (2.) (b.)

B.

BEAKESBOURNE AND GRANGE, Coroner for. *See* CORONER (3.), Cinque Ports.BOROUGH, Coroner. *See* CORONER (1.) (b.)BRIGHTLINGSEA, Coroner for. *See* CORONER (3.), Cinque Ports.BURIAL, Coroner's order for. *See* CORONER (2.) (b.)

C.

CHESTER, Coroner for. *See* CORONER (3.)CINQUE PORTS, Jurisdiction of Coroner for certain. *See* CORONER (3.)

D.

DISTRICTS, Coroners'. *See* CORONER (1.) (a.)DURHAM, Coroners of. *See* CORONER (3.)

E.

ELY, Isle of, Coroner for. *See* CORONER for (3.)EXPLOSIVES, Coroner's inquest on death from accidents connected with. *See* CORONER (2.) (a.)

I.

INQUEST. *See* CORONER (2.)

J.

JURY, Coroner's. *See* CORONER (2.) (b.)

* Second para. of c. 1. in Ruff head.

- L.
- LANGBAURGH, Coroner for Wapentake of. *See* CORONER (3.)
- LINCOLN, Coroner for. *See* CORONER (3.)
- LONDON, Coroners for. *See* CORONER (3.)
- LUNATIC, Inquest on the death of. *See* CORONER (2.) (a.)
- M.
- MINES, Coroner's inquest on deaths from accidents in. *See* CORONER (2.) (a.)
- P.
- PRISON, Coroner's inquest on person dying or executed in. *See* CORONER (2.) (a.)
- R.
- ROYAL HOUSEHOLD, Coroner of. *See* CORONER (3.)
- S.
- SHERIFF, Substitution of Coroner for. *See* CORONER (1.) (c.)
- SOUTHWARK, Coroner for. *See* CORONER (3.)
- V.
- VERGE, Coroner of. *See* CORONER (3.)
- W.
- WITNESSES at Coroner's inquest. *See* CORONER (2.) (c.)
- Y.
- YORK, Coroner for. *See* CORONER (3.)

SPECIMEN INDEX TO THE STATUTE LAW.

PUBLIC HEALTH. MR. G. A. R. FITZGERALD.

This Specimen does not extend to Acts which relate only to the Metropolis or to Scotland or Ireland.

PUBLIC HEALTH :

| | |
|---|--|
| 6 Geo. 4. c. 78. (Quarantine). | 39 & 40 Vict. c. 75. (Rivers Pollution). |
| 17 & 18 Vic. c. 94. | |
| 38 & 39 Vict. c. 55. Public Health Act, 1875, (E.). | 39 & 40 Vict. c. 36. s. 234 (Customs). |

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| (I.) SANITARY POWERS AND DUTIES. | (IV.) POWERS OF LOCAL GOVERNMENT BOARD. |
| (II.) SANITARY DISTRICTS AND AUTHORITIES. | (V.) QUARANTINE. |
| (III.) SPECIAL POWERS OF URBAN SANITARY AUTHORITIES. | (VI.) LOCAL AND SPECIAL. |

(I.) SANITARY POWERS AND DUTIES :

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| (a.) Sewage, privies, scavenging, nuisances : | |
| Provision and regulation of sewers and drains | 38 & 39 Vict. c. 55. ss. 13-26. |
| Use of sewers by manufacturers | 39 & 40 Vict. c. 75. s. 7. |
| Disposal of sewage | 38 & 39 Vict. c. 55. ss. 27-31. |
| Sewage works without district | 38 & 39 Vict. c. 55. ss. 16, 28, 32-34. |
| Enforcement of privy accommodation | 38 & 39 Vict. c. 55. ss. 35-41. |
| Public necessaries in urban districts | 38 & 39 Vict. c. 55. s. 39. |
| Cleansing streets and houses | 38 & 39 Vict. c. 55. ss. 42-47. |
| Cleansing ditches and removal of manure | 38 & 39 Vict. c. 55. ss. 48-50. |
| Definition of nuisances | 38 & 39 Vict. c. 55. s. 91. |
| Procedure for abatement of nuisances | 38 & 39 Vict. c. 55. ss. 92-109. |
| Jurisdiction as to nuisance on ships | 38 & 39 Vict. c. 55. s. 110. |
| Proceedings in case of joint nuisance | 38 & 39 Vict. c. 55. s. 255. |
| Offensive trades in urban districts | 38 & 39 Vict. c. 55. ss. 112-115. |
| Seizure of unsound food exposed for sale | 38 & 39 Vict. c. 55. ss. 116-119. |

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(b.) Rating and borrowing powers :

| | |
|--|--|
| Expenses and rates in urban districts | 38 & 39 Vict. c. 55. ss. 207-228. |
| " " in rural districts | 38 & 39 Vict. c. 55. ss. 229-232. |
| Expenses of joint board ... | 38 & 39 Vict. c. 55. ss. 233-4, 292. |
| Borrowing, and mortgaging rates | 38 & 39 Vict. c. 55. ss. 233-241. |
| Loans by Public Works Loan Com- missioners | } 38 & 39 Vict. c. 55. ss. 242-243. |
| Borrowing by joint boards and certain other authorities | |
| Audit of accounts of authorities | ... 38 & 39 Vict. c. 55. ss. 245-250. |
| Private improvement rates | 38 & 39 Vict. c. 55. ss. 213-215, 268. |

(c.) Legal proceedings :

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|---|-------------------------------------|
| Recovery of penalties and rates, and of expenses from owners, proceedings against local autho- rities, notices, and appeal | } 38 & 39 Vict. c. 55. ss. 251-269. |
| | |

(III.) SPECIAL POWERS OF URBAN SANITARY AUTHORITIES :

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|--|---|
| Management of highways, power to adopt and maintain bridges and turnpike roads | } 38 & 39 Vict. c. 55. ss. 144-148. |
| Costs of repair of highways | |
| Vesting and paving of streets and regulation of buildings | } 38 & 39 Vict. c. 55. ss. 26, 149-160. |
| Lighting streets and supplying gas | |
| Providing places of public recreation and public clocks | } 38 & 39 Vict. c. 55. ss. 164-165. |
| Providing and regulating markets, weighing places, and slaughter- houses | |
| Police regulations as to street obstruction, fires, places of public resort, hackney carriages, and public bathing | } 38 & 39 Vict. c. 55. s. 171. |
| Byelaws for licensing horses, boats, &c., for hire | |
| | 38 & 39 Vict. c. 55. s. 172. |

(IV.) POWERS OF LOCAL GOVERNMENT BOARD :

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| Medical officers of health and other officers | 38 & 39 Vict. c. 55. s. 191. |
| Powers on appeal from sanitary authority | 38 & 39 Vict. c. 55. s. 268. |
| Powers of inspectors | 38 & 39 Vict. c. 55. ss. 293-296, 205. |
| Provisional orders... | 38 & 39 Vict. c. 55. ss. 297-298. |
| Powers on default of sanitary authority | 38 & 39 Vict. c. 55. ss. 299-302 |
| Settlement of differences between authorities | } 38 & 39 Vict. c. 55. ss. 304, 278. |
| Alteration of local Acts | |
| | 38 & 39 Vict. c. 55. s. 303. |

(V.) QUARANTINE :

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|------------------------|--|
| Regulations respecting | } 6 Geo. 4. c. 78 ; 38 & 39 Vict. c. 55. Sch. V., part III. ; 39 & 40 Vict. c. 36. s. 234. |
| Expenses of | |
| | 17 & 18 Vict. c. 94. |

(VI.) LOCAL AND SPECIAL :

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| Investing rural authority with powers of urban authority... | } 38 & 39 Vict. c. 55. s. 276. |
| Constitution and powers of port sanitary authority | |
| Byelaws as to lodging of hop-pickers | 38 & 39 Vict. c. 55. ss. 287-292, 244. |
| Water supply in Oxford and Cambridge Universities | } 38 & 39 Vict. c. 55. s. 314. |
| Main sewerage and joint sewerage boards | |
| Certain local boards | 38 & 39 Vict. c. 55. s. 323. |
| Oxford local board | 38 & 39 Vict. c. 55. s. 339, Sch. II., rules 71, 72. |
| | 38 & 39 Vict. c. 55. s. 342, Sch. II., rule 75. |

| | | |
|--|---|-----------------------------------|
| Boroughs of Oxford, Cambridge, Blandford, Calne, Wenlock, Folkestone, and Newport (Isle of Wight), not boroughs for purposes of Act ... | } | 38 & 39 Vict. c. 55. s. 6. |
| Sewage powers of collegiate bodies and public departments ... | | |
| Interference with works and property of commissioners of sewers and land drainage, of Admiralty and War Department, with navigation, water rights, mines ... | } | 38 & 39 Vict. c. 55. s. 335. |
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| | } | 38 & 39 Vict. c. 55. ss. 327-334. |
| | | |

CROSS TITLES.

A.

ALKALI :

Transfer of powers under Alkali Acts } 38 & 39 Vict. c. 55., Sch. V., Part III. (E.)
to Local Government Board ... }

ANIMALS :

Restrictions on keeping, so as to be } 38 & 39 Vict. c. 55. ss. 44, 47, 91. (E.)
injurious to health ... }

B.

BAKEHOUSE :

Execution of Act by sanitary authority ... 38 & 39 Vict. c. 55. s. 10. (E.)

BATHS AND WASHHOUSES :

Execution of Acts by sanitary authority ... 38 & 39 Vict. c. 55. s. 10. (E.)

Supply of water to ... 38 & 39 Vict. c. 55. s. 65. (E.)

Sanction to borrowing for ... 38 & 39 Vict. c. 55., Sch. V., Part III. (E.)

BOROUGH :

Constituted an urban sanitary district ... 38 & 39 Vict. c. 55. s. 6. (E.)

BRIDGE, power of sanitary authority to adopt. *See PUBLIC HEALTH (III.)*

BUILDINGS, regulation of. *See PUBLIC HEALTH (III.)*

BURIAL :

Of corpse received into mortuary ... 38 & 39 Vict. c. 55. s. 141. (E.)

Prohibition of, under churches } 38 & 39 Vict. c. 55., Sch. V., Part. III. (E.)
in urban districts ... }

BURIAL BOARD :

Transfer of powers to urban authority { 38 & 39 Vict. c. 55. s. 310., and Sch. V.,
Part III. (E.)

Local board to be, in certain cases 38 & 39 Vict. c. 55., Sch. V., Part III. (E.)

Powers of urban authority at ... 38 & 39 Vict. c. 55., Sch. V., Part III. (E.)

C.

CAMBRIDGE UNIVERSITY, supply of water in. *See PUBLIC HEALTH (VI.)*

CELLAR DWELLINGS. *See PUBLIC HEALTH (I.) (c.)*

CHOLERA. *See PUBLIC HEALTH (I.) (d.)*

COMMON LODGING-HOUSES, regulation of. *See PUBLIC HEALTH (I.) (c.) (d.)*

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CORONER :

Power to order removal of corpse for post-mortem examination ... } 38 & 39 Vict. c. 55. s. 143. (E.)

D.

DRAIN. *See PUBLIC HEALTH (I.) (a.)*

DWELLING-HOUSE :

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F.

FACTORIES :

- Power of sanitary authority to require privy } 38 & 39 Vict. c. 55. s. 38. (E.)
 accommodation for ... }
 Not under Factory Acts and not kept in cleanly } 38 & 39 Vict. c. 55. s. 91. (E.)
 state to be deemed nuisances ... }

FIRE :

- Duty of urban sanitary authority to } 38 & 39 Vict. c. 55. ss. 66, 171. (E.)
 provide fireplugs, &c. ... }

FOOD, seizure of unsound. *See* PUBLIC HEALTH (I.) (a.)

G.

Gas :

- Pollution of streams by gas washings ... 38 & 39 Vict. c. 55. s. 68. (E.)
 Power of sanitary authorities to supply; and of company } 38 & 39 Vict. c. 55.
 to sell their undertaking ... } ss. 161-163 (E.)

H.

HACKNEY CARRIAGES, regulation of, in urban districts. *See* PUBLIC HEALTH (III.)
 HEALTH. *See* PUBLIC HEALTH.

HIGHWAYS in urban districts. *See* PUBLIC HEALTH (III.)

- Meeting of highway board ... 38 & 39 Vict. c. 55., Sch. V., Part III. (E.)
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HOP PICKERS, lodging of. *See* PUBLIC HEALTH (VI.)

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I.

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IMPROVEMENT OF LAND :

- Works for supply of sewage to land to be } 38 & 39 Vict. c. 55. s. 31. (E.)
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INSPECTOR OF NUISANCES :

- Compulsory appointment of, by sanitary } 38 & 39 Vict. c. 55. ss. 189-190. (E.)
 authorities ... }

L.

LABOURERS' DWELLINGS :

- Execution by sanitary authority of 31 & 32 } 38 & 39 Vict. c. 55. s. 10 (E.)
 Vict. c. 130 ... }

LANCASTER, DUCHY OF :

- Power to sell lands to sanitary authority 38 & 39 Vict. c. 55. s. 178 (E.)

LIGHTING AND WATCHING :

- Act superseded in urban districts ... 38 & 39 Vict. c. 55. s. 163 (E.)

LOCAL ACT, alteration of. *See* PUBLIC HEALTH (IV.)

LODGING-HOUSES. *See* PUBLIC HEALTH (I.) (d.)

- Penalty on letting, where infected } 38 & 39 Vict. c. 55. ss. 128-129. (E.)
 persons have been lodging, and on }
 making false representations as to }
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LOCAL BOARD. *See* PUBLIC HEALTH (II.), (VI.)

LOCAL GOVERNMENT. *See* PUBLIC HEALTH (III.)

LOCAL GOVERNMENT BOARD. *See* PUBLIC HEALTH (IV.)

- Transfer to, of powers of Secretary of State, } 38 & 39 Vict. c. 55., Sch. V.,
 Treasury, and Board of Trade under } Part III, (E.)
 local Acts, Highway, Turnpike, Baths and }
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- Publication of general orders of 38 & 39 Vict. c. 55., Sch. V., Part III. (E.)

LOCAL GOVERNMENT DISTRICT. *See* PUBLIC HEALTH (II.)

M.

MARKET, establishment and regulation by sanitary authority. *See* PUBLIC HEALTH (III.)

MEAT, seizure of unsound. *See* PUBLIC HEALTH (I.) (a.)

MEDICAL OFFICER OF HEALTH :

Compulsory appointment of ... 38 & 39 Vict. c. 55. ss. 189-191. (E.)

Power to unite sanitary districts for appointing ... s. 286.

MILK, seizure of unsound. *See* PUBLIC HEALTH (I.) (a.)

MORTUARY. *See* PUBLIC HEALTH (I.) (d.)

N.

NUISANCE. *See* PUBLIC HEALTH (I.) (a.) INSPECTOR OF NUISANCES.

O.

OVERCROWDING :

Of houses, schools, and factories ... 38 & 39 Vict. c. 55. ss. 91, 109. (E.)

OXFORD (LOCAL BOARD). *See* PUBLIC HEALTH (VI.)

OXFORD UNIVERSITY. (*See* PUBLIC HEALTH (VI.)

P.

POOR :

Guardians :

Appointment by, of school attendance committee. *See* EDUCATION.

Board of, made rural sanitary authority ... 38 & 39 Vict. c. 55, s. 9. (E.)

Duties of Clerk under Public Health Act 38 & 39 Vict. c. 55. s. 190. (E.)

" medical officer " " 38 & 39 Vict. c. 55. ss. 191, 286. (E.)

PORT SANITARY AUTHORITY. *See* PUBLIC HEALTH (VI.)

PUBLIC PLEASURE GROUNDS in urban districts. *See* PUBLIC HEALTH (III.)

PUBLIC WORKS LOAN :

Advances by Commissioners to }
sanitary authorities ... } 38 & 39 Vict. c. 55. ss. 242, 243. (E.)

R.

RIVER. *See* PUBLIC HEALTH (I.) (b.)

S.

SANITARY AUTHORITY. *See* PUBLIC HEALTH (II.) SMOKE.

SEWERAGE. *See* PUBLIC HEALTH (I.) (a.)

SLAUGHTER-HOUSES. *See* PUBLIC HEALTH (III.)

SMOKE :

Compulsory consumption of ... 38 & 39 Vict. c. 55. s. 91. (E.)

Duty of sanitary authority to enforce Acts }
relating to ... } 38 & 39 Vict. c. 55. s. 92. (E.)

SOLICITOR :

Taxation of bill of, for business of sanitary }
authority ... } 38 & 39 Vict. c. 55. s. 249. (E.)

SPECIAL DRAINAGE DISTRICT. *See* PUBLIC HEALTH (II.)

T.

TURNPIKE ROADS. *See* LOCAL GOVERNMENT BOARD, PUBLIC HEALTH (III.)

W.

WATER. *See* PUBLIC HEALTH (I.) (b.)

Power of company to lease or sell water. }
works to sanitary authority ... } 38 & 39 Vict. c. 55. s. . (E.)

WORKSHOP :

Not under Factory Acts and not kept in a }
cleanly state to be deemed a nuisance } 38 & 39 Vict. c. 55. s. 91. (E.)

VI.—SELECT CASES: SCOTLAND.

By HUGH BARCLAY, LL.D., Sheriff Substitute, Perth.

Sale—Suspensive Condition—Delivery—Bankrupt.

A sale of flax was made by sale note. The flax was forwarded by railway and received by the manager, and partly used, but without the buyer's knowledge. On the buyer learning of the arrival, he having at that time resolved to stop payment, directed the goods to be put aside, and declined to accept the bill which was a condition of the sale. *Held* in a question between the seller and the trustee for the creditors of the buyer, (1st) that the acceptance of the bill was a suspensive condition of the sale, and until implemented the property of the goods did not pass; (2nd) that the sellers had not waived their right to insist on the condition; and (3rd) the sellers were therefore entitled to restitution of the goods. In the discussion numerous English decisions were cited. Per Lord Justice Clerk (Lord Moncreiff): "I am of opinion, in the first place, that until the letter of advice arrived, and the bankrupt had reasonable opportunity of acting on it, delivery was not complete, and might be honestly and properly refused when the resolution to stop was taken; then looking at the terms of the letter of advice, I am of opinion that the sale was one under the suspensive condition, that a bill for the price should be granted on delivery. The bill was *not* granted, and therefore the property never passed, and the seller is entitled to demand the goods." Lords Neaves, Ormidale, and Gifford concurred. 18 Jan., 1876. *Brandt & Co. v. Dickson*, 3 S.C., 375.

Company Clauses Consolidation (Scotland) Act—Transfer of Shares.

A person executed a transfer of Railway shares. A year later, his estates were sequestrated under the Bankrupt Statute. After the sequestration the transfer was recorded. Some years after, the trustee claimed the shares as falling to him. *Held* that the true criterion of the completion of a transference was not mere intimation to the Company, but the reception of the transferee as a partner. Therefore the transferee having completed his title, and the trustee not having done so, the latter

could not now claim. Many English cases were cited. Per Lord Justice Clerk (Lord Moncreiff): "That which is essential under the Statute is that the transferee shall be put on the register of shareholders, and the only question precedent to that is whether the title to be put on the register of shareholders has been transferred by a *habile deed*." "It is quite plain therefore, that an assignation to shares, though intimated, will not make the assignee a partner of the Company." Lords Neaves, Ormidale, and Gifford concurred. 3 Feb., 1876. *Morrison v. Harrison*, 3 S.C., 406.

Ship—Charter-party—Demurrage.

A charter-party stipulated that the vessel should "proceed to a loading berth in Leith Docks, as ordered, and there load in ten working days, as customary, a full and complete cargo of steam coals." On 16th April the master intimated to the charterers that the ship then lying at a loading berth was ready to receive her cargo. The charterers entered her in the dockmaster's books for a crane berth, for which the vessel had to wait her turn till 3rd May. In an action of demurrage, *Held*, that under the charter-party the charterers had the choice of a loading berth, but that the lay days commenced to run from 17th April, when the loading might have commenced. English decisions were cited on both sides, especially *Tapscott v. Balfour*, L.R. C.P. 46. Per Lord Ardmillan: "The intermediate view, and I think the view taken in the case of *Tapscott* when rightly understood, is the sound one, that the lay days should be held to have begun from the day the vessel was in the dock, and when notice was given that she was ready to take in her cargo, and demurrage must be awarded accordingly." Lords Mure and Deas concurred. 4 Feb., 1876. *Dall' Orso v. Mason & Co.*, 3 S.C., 419.

Reparation—Culpa.

A company of ironmasters in course of their trade accumulated large heaps of refuse of combustible materials, which took fire. A neighbouring farmer sued for damages arising from noxious vapours. The Court awarded £200 damages. The English case of *Rylands v. Fletcher*, L.R. 3 E. & i. App. 330, was chiefly relied on. Per Lord Justice Clerk (Lord Moncreiff): "I think that culpa does lie at the root of the matter. If a man puts on his land a new combination of materials which he knows, or ought to know, are of a dangerous nature,

then either due care will prevent injury, in which case he is liable if injury occurs for not taking due care, or else no precautions will prevent injury, in which case he is liable for placing the materials upon the ground." Lords Neaves, Ormisdale, and Gifford concurred. 18 Feb., 1876. *Chalmers v. Dixon*, 3 S.C., 461.

Companies Act, 1862—Voluntary Winding-up.

(1.) A company, by circular, gave notice of a meeting to sanction its voluntary winding-up. The meeting passed a resolution in terms of section 129, sub-section 3, and appointed a liquidator. *Held* the resolution was invalid because of no subsequent meeting to confirm the resolution. Several English cases were cited. Per Lord President (Inglis): "A resolution to wind-up under the second head of section 129 cannot be effectual unless it be carried by a three-fourths majority at one meeting, and confirmed by a majority at a second meeting, and unless proper notice of the intention to propose the resolution has been properly given." Lords Deas, Ardmillan, and Mure concurred. 18 Feb., 1876. *Wilson*, Liquidator of the Glasgow and District Co-operative Society, v. *McGinn & Co.*, 3 S.C., 474.

(2.) After notice given under section 51 and confirmed, a company was voluntarily wound up. *Held* the notice was sufficient, but that the Court, under the 138th section, had no power to stay proceedings by creditors against a company which was wound up voluntarily. Many English cases were cited. Per Lord President (Inglis), after distinguishing between the notice necessary for a voluntary winding-up and for a winding-up under orders of Court: "I think that the notice was a good one. No shareholder who read it could doubt what the question to be considered would be besides the primary question whether there should be a winding-up at all. I do not think it was intended that the notice should be strictly construed. If sufficient information be given to satisfy the policy of the statute, it is sufficient. But the important question is whether the remedy as asked is one of the powers contemplated by section 138. The true construction of the section is that the Courts could enforce orders for payment of calls and others of the same kind. If you contend it to give the Court power to restrain the action and diligence of creditors, the result will be serious. The liquidators, without the sanction of the Court, may take any measures against creditors; but the creditors, it is contended, are not to be entitled to take any measures against them. I am, therefore, of

opinion (1st) that there are powers which the Court may exercise in a voluntary winding-up under supervision of the Court which they cannot exercise in a voluntary winding-up; and (2) that one of those powers is to stay actions, suits, &c., which is confined to voluntary windings-up under supervision of the Court." Lords Deas, Ardmillan, and Mure concurred. 10 Mar., 1876. *Ideuard v. Gardner & Sons*, 3 S.C., 577.

Crossed Cheque—Forgery.

A forged cheque for £4,800, drawn in name of a customer of the Clydesdale Bank, payable to D. P. or bearer, and crossed, bearing also a forged indorsation of D. P., was cashed by a clerk of D. P. at the Royal Bank, of which D. P. was a customer. The proceeds were employed by the clerk in paying a balance due by D. P. on the Stock Exchange. Same day the Royal Bank presented the cheque at the Clearing House, and had the amount credited to their account with the Clydesdale Bank. Ten days afterwards the Clydesdale Bank discovered that the signature of the drawer and indorser of the cheque were forged, and intimated that they held the Royal Bank responsible. In an action by the Clydesdale Bank against the Royal Bank, *Held* that the latter had only acted as the agent of D. P., and were not liable. English cases were cited. Per Lord President (Inglis): "The cheque was paid to D. P., who was a customer of the Royal Bank. The Royal Bank advanced the amount of the cheque at once. They acted only as the hand or agent of D. P. The Clydesdale Bank, on the other hand, where the cheque was presented, paid the money on the understanding that the signature was genuine. When they paid money on a draft of their own customer they were bound to satisfy themselves that the signature was genuine. The Royal Bank, which presented the cheque, had not necessarily any knowledge of the signature. But the Clydesdale Bank must have known the signature of their own customer. They were in the everyday habit of cashing his cheques." 11 Mar., 1876. *Clydesdale Banking Co. v. Royal Bank*, 3 S.C., 586.

Reviews of New Books.

A Digest of the Criminal Law. By Sir JAMES FITZJAMES STEPHEN, K.C.S.I., Q.C. Macmillan & Co. 1877.

The publication of this work marks another stage in the road which Sir James Stephen is tracing out through the "codeless myriad of precedent" and "wilderness of single instances" of English Law. And his present volume, which will form a companion work to the promised new edition of the author's "General View of the Criminal Law," has the great merit of breaking up the ground exactly where it has been generally agreed that codification may most easily begin. Sir James Stephen has succeeded with rare felicity in arousing the interest at once of the professional man and of the layman, of the scientific jurist and of the working man. This is itself a great step towards success, for the many as well as the few must be interested in what touches all, ere any action can fruitfully be taken in so serious a matter. "Demos" can be brought face to face with the question, and when he once realises the value to himself of knowing the duties and forbearances laid upon him by the Law, and the sanctions with which the Law is armed, he will not be the last to say, "put this in plain language, that I may know what I am to do, and what I am to forbear from doing, so that I may not be taken unawares." This is, of course, not the professional view of the question, but it is one which, it cannot be doubted, will have considerable influence in bringing about the desired result. Meanwhile, the usual fate of subjects which are constantly talked about, but in which little or no progress seems to be made, has befallen Codification. Speaking only last year, at the Liverpool Congress of the Social Science Association, Mr. Farrer Herschell, Q.C., in his Presidential address at the opening of the Jurisprudence Department (printed in our number for November, 1876), could say of it, "committees have reported, commissions have made suggestions, experiments have been attempted, and yet we seem as far to-day from the goal as ever we did." And this he said while saying also, "deliberately," that in his judgment it was "a disgrace to a civilized country that in no branch of its Jurisprudence is there to be found a definite and authoritative exposition of the Law." It is some comfort

to find so earnest an advocate of codification declaring in June of the current year, when presiding over a meeting of the Law Amendment Society, that "he did not despair of codification being accomplished as some did," and pointing out that there was "a growing feeling in its favour which should be taken advantage of." It is interesting to observe that Mr. Herschell, on this occasion, recommended commencing with the Criminal Law, "because we could more easily bring home to the public generally the expediency of having the Criminal Laws written down in black and white than other branches of the Law, and that it was not right for a person to be punished for a crime without having an opportunity of hearing what was and what was not a crime." Whatever the mode ultimately adopted for obtaining the sanction of Parliament to such a measure, Mr. Herschell said that no doubt "all that had passed in India" would be a considerable help. For this part of the work Sir James Stephen is so largely responsible that his assistance could scarcely be dispensed with in the practically virgin field at home. When the learned author of the Digest of Criminal Law observes in his introduction that "a Draft Penal Code ought not to be discussed in Parliament until it had been laid for a considerable time before the public," he re-echoes the feelings which have guided jurists in other lands where codification is not so strange a word. We remember being in Italy during the time that the Vigliani Draft Penal Code was under discussion, and that discussion was carried on under exactly the circumstances that we conceive Sir James Stephen to advocate. We were in Turin, and in conversation with one of the Professors of Law at the University of the old Sub-Alpine capital, and had the pleasure of receiving from him a pamphlet of Observations on the Vigliani Project, the joint work of himself and his colleagues in the Faculty of Law. And now that Signor Mancini holds the Portfolio of Grace and Justice, a similar course is being pursued, and, as we notice elsewhere, the order of Advocates has been invited to express its opinion, through its Council, on points involved in the New Draft Code. The Literature of the project is still receiving additions, and we learn that a very extensive work of comparative Jurisprudence has quite lately been commenced by Signor Fanti, of Imola, in which he contrasts the Draft Code, both with previous Legislation in the various Italian States and with Foreign Codes. So it has been in the Netherlands, whose Draft Penal Code has been discussed both by a Royal Commission and by the Cham-

bers, by distinguished Dutch Penalists, such as M. Pols, of Utrecht, and abroad by the Society of Comparative Legislation in Paris, as well as by the Review edited by Sigr. Beltrani Scalia, in Rome. In this country there is a harder work to be done than mere criticism, and that is what Sir James Stephen offers us, viz.: "a literal translation of the Acts of Parliament which contain the Criminal Law into the language of common life." He has also weeded out those portions of the Acts which relate to Procedure, as being "a subject in itself separate from, though closely connected with, the matter which ought to be contained in a Penal Code." Here again Sir James is in exact accordance with foreign practice. Parliamentary sanction was given to the drawing up of a Code of Penal Procedure for Italy a few days after the Peace of Villafranca, and it has been in operation since 1862, although Ministeries have risen and fallen without completing the Legislative Unity of the country by a Penal Code. The one implies the other, for of course it would not be possible to work a Penal Code without a Code of Procedure, though it has been found possible to apply a uniform procedure to locally varying Codes, Sardinian, Tuscan, Neapolitan, &c. The Austrian Empire obtained, in 1873, its fourth Code of Criminal Instruction promulgated since the beginning of this century. It is purely Cisleithan in its currency, and there must be a separate Code of Procedure for Hungary when the Penal Code now under discussion is adopted. Sir James Stephen carries out in his present work the useful system of appending illustrations to his enunciations of the Law. These are always to the point, and often interesting from their sources and associations. An Indian illustration, under the article "Extortion and Oppression by Public Officers," brings out the curious fact that neither Macaulay in his Essay, nor Marshman and Mill in their Histories, distinctly state the charges against Warren Hastings. Usually these illustrations are based upon cases to which reference is made in the footnotes, but sometimes (as at p. 272, on making a False Document) they embody what the learned author conceives would be decided if the particular point were to be raised. Where the Law itself is vague, as on Libel, he submits the propositions which he has drawn up as the nearest approach he can make to a definite statement of the Law. This "near approach" will doubtless be regarded with scarcely less interest than the "definite statements" found elsewhere. We have found one or two instances, not comprised in the "Corrigenda," in which Homer has nodded. On p. xxix. of the Introduction,

"*meus*" has been printed for "*mens*"; on p. 346, in an extract from the judgment in *R. v. Phillpot*, "were" for "where," and on p. 271, Sir James creates a new peer by the title of the Earl of *Hopetoun*. Might not A., who personated a brother of the Earl of *Hopetoun*, have pleaded, under the former orthography, that he was not making use of the title of any existing peerage? We have no desire to "carry owls to Athens," but we submit this possibility to one who is himself so fertile in discussion of the many topics that he presents to our view. Suggestive beyond most writers of Law-books, clear and epigrammatic in his language, Sir James Stephen is an author pleasant to read, and hard to part from. But we expect soon to meet him in another portion of his present field of labour. By that time, perhaps, to adapt one of his own similes, a little more of the "scaffolding" that still surrounds the house wherein English legal lore lies half buried out of sight, will have been knocked away, and the day will be nearer at hand when the house shall be considered so "proximately complete" that the scaffolding may be altogether taken down, and an English Code shall see the light.

Church and State: Their Relations Historically Developed. By HEINRICH GEFFCKEN, Professor of International Law at the University of Strasburg, late Hanseatic Minister-Resident at the Court of St. James's. Translated and edited by E. FAIRFAX TAYLOR. Longmans. 1877.

In these interesting volumes we gladly welcome the thoughtful and learned contribution of a Diplomatist and a Jurist to the study of a subject which ought to receive the most earnest attention of statesmen in all countries of the civilised world. For whether in the East or in the West, in the old world or in the new, in Bulgaria or in Brazil, this question of the Relations of Church and State forces itself to the front, and will not be put aside. It is a very complicated question, and very difficult for the politician to deal with; but the longer its solution is postponed the harder will it become to effect one that shall not shake society to its foundations. Here in England we are, perhaps, somewhat too ready to thank the Lord that we are not as other nations, torn asunder by contending parties of Ultramontanes and Social Democrats, Legitimists and Red Republicans, and the like. But there are always hidden forces within a nation, like the hot springs far down under the earth's crust, which sometimes, without warning, burst their prison and spread destruction around. Cardinal

Manning has told us lately that "Time works for the Church." And the Church, we may add, works in many ways for herself. "Unresting, unhasting," the Church of Cardinal Manning's thoughts bides her time; she watches the waxing and the waning of principalities and powers, which to-day are and to-morrow are not, while she was yesterday, is to-day, and, as he untrlingly affirms, will be to-morrow, when the mighty ones of the earth shall have been laid low, and the proudest dynasties shall be but dust returned unto its own. Meanwhile, to procure the accomplishment of any object which she may consider to serve her ends, no means are too great or too small. It may be but the keeping of a Festa, or the public recitation of an "Angelus;" the means are many, the end is the same. "Cœlum et terra transibunt," quotes the Cardinal, "verba autem mea non præteribunt."

Dr. Geffcken belongs to the Doric Order of Historians; he is coldly impressive, austere classical, and seldom comes down from the lofty pedestal of that impartial philosopher of whom one gets so tired in the pages of Gibbon. But Gibbon's philosopher used to smile, while Dr. Geffcken's is far too correct for that. The "Evangelical Church" in Germany, itself in its present condition the result of State-enforced fusion between two not particularly harmonious elements, the Lutheran and Calvinistic, is scarcely a happy example of the nursing motherhood of the State. In forcing on the fusion, it certainly appears to us that the State was stepping beyond its powers, and we can scarcely wonder that the result should be a body in which the shooting at a clergyman during the recital of the Nicene Creed in one of the principal churches of the capital should have been taken for a new piece of ritual, and in which the Emperor finds it necessary to thank a Synod for expressing its adherence to the Apostles Creed. Is it worth while keeping up a State Church for so small a modicum of Theology? It may seem curious that the work of Martin Luther should have been less enduring than that of John Knox. The reason would appear to be that the organisation of the latter was more firmly established, and took a definite shape sooner than that of the former, though at first it might have been difficult to see any difference between them. Both Reformers started with a quasi-Episcopal platform, and an at least partially Liturgical service. The "Superintendent" has lingered on in the Lutheran system, which even admits in Denmark the title, and in Sweden perhaps the historical fact, of an Episcopate. In the Calvinistic system, whether on the Continent or in Scotland, the "Superintendent" and the "Reader"

have given way to the "Minister" and the "Elders," who alone survive of the Reformation Platform, and divide the rule between them. Some among ourselves, in the present day, are casting envious glances at that which they consider to be the greater spiritual freedom of the Scottish as compared with the English Establishment. The difficulty of the position in regard to Established Churches is no doubt increased by the admission to the Legislature of members of all Religious Confessions. There is a greater reluctance to submit questions either of doctrine or ritual to such a very mixed tribunal as that, for instance, of the High Court of Parliament as now constituted, than there would have been when scarcely any dissident from the Establishment was to be found within its ranks. And this reluctance, shared as it is by not a few of those members of the Legislature who themselves are not members of the Establishment, is far more likely to hasten the progress of events in the direction of a separation of Church and State, than the fanatical language of enthusiastic partisans on either side. Montalembert, in the "Catholic Congress" at Malines, pleaded as one of the sons of the Crusaders, and he pleaded for a Free Church in a Free State. Those who have adopted this famous motto have not, indeed, always carried it out, either in Montalembert's sense, or in any other grammatically possible sense. Neither in the country of Montalembert, nor in that of Cavour, do we see as yet a realisation of the vision of "*Libera Chiesa in Libero Stato*." The rulers of the dominant Church in France have acted as though they were the commanders of so many Corps d'Armée, and French Cardinals have openly spoken of their clergy as "regiments." It is not surprising under the circumstances, that M. Gambetta should have recently pronounced a funeral oration over the defunct Liberties of the Gallican Church, and have said, in no disguised language, "*l'ennemi c'est le Cléricalisme*."

Dr. Geffcken is an avowed opponent of Ultramontanism or Clericalism, yet he seems to us one of those opponents who frequently play unconsciously into their adversaries' hands. He tells us of the "sterility of State Churchdom" while blaming the errors of non-established confessions, and he cherishes a deep distrust of Liberalism. He gives no more credit to the German and Swiss Old Catholic movements for their spiritual side, as representing and embodying certain theological needs, than would Cardinal Manning. Yet those two movements, parallel and not identical, seem worthy of the serious attention of all who are interested in the solution of the problem of Church and

State, and of far more attention than Dr. Geffcken has given them in his book. A disbeliever in what he calls "Liberal Episcopatism," which he considers to be incongruous with the "historical facts of Catholicism," it is not possible for Dr. Geffcken to sympathise with movements having this "incongruous" theory for their basis, and doing their best to work it out, according to Wessenberg's own plan, through "well-ordered assemblies of all the members of the community." Those who have attended such assemblies may indeed think them incompatible with Curialism, but they will probably also think Curialism incompatible with true "Historical Catholicism."

Dr. Geffcken tells us what he considers to be the points in contest upon which the body which he calls "the Catholic Church," *i.e.*, the Roman Catholic Church, will never yield. But he does not show us where a "modus vivendi" is to be found. Not, certainly, in the Ultramontane Camp, where it would be hopeless to look for it. Equally little does Dr. Geffcken appear to find it among German Liberals, whom he represents as "harnessed to the Car of the Kulturkampf," and whose "name is verily as *lucus à non lucendo*." When one who has held high Diplomatic office, says of his country that "All firm principles of justice and liberty disappear in the overpowering noise of National-Liberal phraseology," one may be excused for thinking that he despairs of the State. And his view of the Church is scarcely more hopeful. The day of Concordats is indeed over, but what shall take their place? We remember hearing a venerable Monsignore, some years ago, announce from the pulpit of St. Mark's, Venice, that "between the Church and Modern Society there could be no peace." We turn to Dr. Geffcken for the newest light on a different side, and the only consolation we obtain is the assurance that "the kernel of the struggle lies beyond the power of the State, just because Church and State occupy different territories of dominion."

A Comparative Survey of the Laws in force for the Prohibition, Regulation, and Licensing of Vice in England and other Countries. By SHELDON AMOS, M.A., Barrister-at-Law. Stevens & Sons. 1877.

On the last occasion when a celebrated French orator visited London, it may be within the recollection of many that he not only delivered a course of addresses on Church Reform, but that the walls of London were at the same time placarded with

the seemingly singular announcement of "Père Hyacinthe on the Abolition of State-Regulated Vice." If we mistake not, Professor Sheldon Amos took part in the latter of these meetings, as a fellow-worker with the ex-Carmelite preacher of the Advent and Lent Conferences at Notre Dame. The subject to which the Preacher has devoted his magnificent powers of oratory, and the Professor his unwearied zeal, his stores of juridical learning, and his practised pen, is one not in itself attractive, but which, nevertheless, requires to be treated from various points of view. Hitherto, as Professor Amos justly remarks, it has been somewhat too exclusively left in the possession of the Medical profession. But the Clergy, as the representatives of a great moral power, and the members of the Bar, as directly concerned with the interpretation and the amendment of the Law, have an equal right to be heard, and the Professor of Jurisprudence in University College has given his brethren of the legal profession no little food for thought in the comprehensive volume before us. It would be quite impossible for us to fill our pages with an analysis of so laborious and exhaustive a work. But we may state our conviction that the comparative system, adopted by Professor Amos, is the only one which can either adequately set forth the state of the Law on this subject, or enable a writer to avoid the snares of rhetorical extravagance and partizanship into which so many writers and speakers have fallen. That garrison towns afford cause for a special and carefully limited legislation it would be difficult to deny, and, in such cases, the utmost, we imagine, that Professor Amos would plead for is that the laws which may be deemed necessary should be clear and precise in their limitations, so as to avoid any of those dangers that a constitutional lawyer would naturally fear.

If the Legal profession is ever to be induced to give this question the serious consideration which it deserves, it must be by means of dispassionate statements of the Law and Practice of this country compared with those of other countries, and the analysis of statistics and other evidence bearing on the apparent working of the existing English and Continental systems. Professor Amos, like Père Hyacinthe, is an uncompromising opponent of the Continental system; he also sees much that, to his thinking, needs amendment in our own system. There is already in this country a considerable area of power lodged in the hands of our police force; how considerable that area is we do not often realise, until some event unexpectedly makes us

acquainted with it. Professor Amos urges strong arguments against definitely establishing a system which he believes can exist "only under the condition of substituting Government by irresponsible Police for Government by Law and by Courts of Justice." Very few of us, we fancy, would at all care to have it depend on nothing more stable than the allegation of a Superintendent of Police, on the information of some subordinate, whether we should be brought before a Justices' Court of Summary Jurisdiction. In the cases which Professor Amos is considering, the effect of such a vagueness of the ground of accusation is not only to erect every Superintendent of Police into an irresponsible Public Prosecutor for the class of cases for which he has these powers, but also, the Professor urges, "to place every woman, however blameless, practically in the hands of the police." And it may be noted that marriage does not appear to place a bar to these extraordinary powers of the police in England, as it does in Italy and other Continental countries. The methods of procedure adopted in some foreign countries are rather more forcible than those as yet in vogue among ourselves. One quotation which Professor Amos makes throws a curious light on the by-play of the Franco-German War, and reminds us of a passage in the late Dr. Livingstone's Autobiography. We observe, with some surprise, by the way, that in his quotation from M. Lecour, Professor Amos translates "inconvenantes" by "unaccommodating," which spoils part of the pith of the story. The German Army, when investing Paris, it seems, according to the evidence of M. Lecour, instituted weekly examinations, of which the subjects "qui seraient inexactes aux visites, ou inconvenantes dans leur attitude, seraient punies comme à Berlin, et recevraient coups de bâton." Now Dr. Livingstone tells us that his forefathers were converted from Popery to Presbyterianism by the visit of the laird's factor, who came among them with a "thick yellow stick," so that for some time the unsophisticated Islesmen used to call their new religion "the religion of the yellow stick." Those who study the earnest arguments of Professor Amos, and the mass of evidence, and legal and statistical information which he has collected, will probably doubt, with him, the good results of introducing among ourselves the rule of the "thick stick," whether as practised in Berlin or among the Western Isles.

A Memoir of Rt. Hon. James, First Lord Abinger, Chief Baron of Her Majesty's Court of Exchequer. Including a Fragment of his

Autobiography, and Selections from his Correspondence and Speeches. By Hon. PETER CAMPBELL SCARLETT, C.B. John Murray. 1877.

In this pleasant and chatty volume the story of the Chief Baron is chiefly told by himself, either directly, in his fragment of Autobiography, or indirectly, in the letters interspersed throughout the Memoir, and the speeches printed in the Appendix. We are thus carried back to the days of Old Trinity, when Fellow Commoners, such as James Scarlett, were excused from all attendance at College lectures, and restricted to an Honorary Degree, and when any young man who went into society was expected to be at least a "two bottle man." Shrinking from this test of fashion, young Scarlett declined the proffered favours of the society of the "True Blue Club" at Trinity, and consequently attracted the notice of Fellows of the College and resident Masters, who concluded that "there must be something very unusual" about so resolutely abstemious a Fellow Commoner. Thus forced by his own action into becoming a reading man, Scarlett soon made valuable and lasting friendships, and he can tell us how he saw Porson drink sixteen cups of tea at a sitting, and how Romilly urged him to learn French without delay, in order that he might enjoy "the beauty and eloquence of Rousseau's style." Lord Abinger coincides with his friend's view of the sufficiency of the inducement, but makes some sensible reservations on the morbidness which he finds in Rousseau's most beautiful compositions. After he had been called to the Bar, Scarlett was in doubt whether to go out to the West Indies, and make use of his family relations with Jamaica to push his fortunes there, or to try his luck, without Professional connections, in England where he "scarcely knew a single Attorney." Here Romilly again came to the rescue, and recommended his giving the old country at least a fair trial. That this was good advice Scarlett's subsequent history sufficiently proves, and it is small wonder that, looking back on his past life, Lord Abinger should write in his Autobiography, "Of all the friends whom I cultivated in the Profession of the Law, I must put Romilly foremost." Very interesting are the many personal reminiscences sown broadcast through the pages of the Autobiography, in which heroes of the Senate and the Forum live for us once more. In Lord Abinger's pages there stand out in vivid relief Romilly, "terrible in reply," and of such quickness in understanding what he studied that he would read a new book "as fast as the leaves could be cut open"; Pitt, "in his own way quite unrivalled"; Fox, "passion-

ate, as Pitt never could be"; Burke, "full of genius, imagination, and learning," yet "never a successful debater"; Sheridan, brilliant in wit, "his voice charming, his action elegant, and his argument lively and acute"; Erskine, of whom Sheridan said that "in his gown and wig he had the wisdom of an angel, but the moment he puts them off he is nothing but a schoolboy." Yet many another of the mighty men of old, "*quos perscribere longum*," passes before us, as James Scarlett draws upon the treasure-house of his memory, but space warns us to deny ourselves the pleasure of quotations from which it is hard to refrain. Long kept from the reward of the silk, to which his position entitled him, Scarlett was in the midst of a cause at the Guildhall when Lord Eldon sent to intimate that he was ready to receive his oaths. So little was the honour expected when it did come, that Scarlett had to finish the Guildhall sittings in his stuff gown. From this date (1816) to the period of his appointment as Chief Baron in 1834, Lord Abinger says of himself that he had "a longer series of successes than has ever fallen to the lot of any other man in the law." In 1823, in the course of a tour on the Continent, Scarlett stayed at Coppet with the Staëls and De Broglies. The then Duke was opposed to the policy of the restored Bourbons, and in common with his brother-in-law, Auguste de Staël, took a warm interest, "like other enlightened Frenchmen of that epoch, in the political events shadowing out a more liberal policy in England." De Staël besought the Scarletts to patronise the London University, to give independence to Greece, to be favourable to every measure for the improvement of the Colonies and the gradual abolition of slavery, to favour the progress of rational liberty in France, to oppose the Jesuitic influence by the most important step that could be taken against it, viz., Catholic Emancipation, and so should they have "his benison." James Scarlett died in harness, in the midst of his judicial duties, during the Spring Assizes of 1844. His son ends the Memoir as he begins it, by lamenting the scarcity of material to illustrate the life of James, first Lord Abinger. But he has wisely allowed his father as much as possible to tell his own story, so that the reader may judge for himself of the "wit," the "pleasant humour," the "well-stored mind," of one of whom his son lovingly says that he might have taken for his motto, "*Integer vitæ, scelerisque purus*."

To the aspirant for forensic honours the chapter in Lord Abinger's Autobiography dedicated to "Public Speaking" will furnish much food for reflection, and there may be many

who will wish to learn the secret of the machine which Scarlett was quaintly said to have invented, "to make the judge nod approval," as is related in chapter xviii., where his own explanation of the "machine" is given. Mr. Peter Campbell Scarlett has given to the world an interesting memoir of an able judge, ~~but~~ he has not succeeded so well in convincing us, at least, of the descent of the Scarlett family in Sussex from the "joint Viscounts of Carlat" in Aquitaine, who "appear to have accompanied the Conqueror in 1066." Lord Abinger himself gives forth but an uncertain sound on his genealogy, a subject in which he took no interest. We fear that there is more romance than probability about the three "joint Viscounts," who probably would appear, to a comparative mythologist, to have a remarkable affinity with the "tres chiulæ" in which the Angle, the Saxon, and the Jute are said to have fared forth over the Northern Sea to the rich shores of Britain.

Principles of the Criminal Law. A concise exposition of the Nature of Crime, the various offences punishable by the English Law, the Law of Criminal Procedure, and the Law of Summary Convictions. By SEYMOUR F. HARRIS, B.C.L., M.A., Oxon., Barrister-at-Law. Stevens & Haynes. 1877.

There is no lack of works on Criminal Law, but there was room for such a useful handbook of Principles as Mr. Seymour Harris has supplied. Accustomed, by his previous labours, to the task of analysing the Law, Mr. Harris has brought to bear upon his present work qualifications well adapted to secure the successful accomplishment of the object which he had set before him. That object is not an ambitious one, for it does not pretend to soar above utility to the young practitioner and the student. For both these classes, and for the yet wider class who may require a book of reference on the subject, Mr. Harris has produced a clear and convenient Epitome of the Law. His statements of the Law are generally terse and intelligible, and his references are brought down to date. His own circuit experience has, in some cases, enabled him to mention the first occasions on which recent alterations of the Law were put into operation, as, *e.g.*, on p. 139, where he is able to state that the first trial for sending an unseaworthy ship to sea, at which, in pursuance of Section 4 of 38 and 39 Vict., c. 88, the evidence of the defendant was taken, occurred at the Liverpool Spring Assizes of 1876. It will occasionally be necessary for a reader

who may refer to the book for some specific detail, to refer back for the Act, of which, in some cases, the section alone has been given at the foot of the page. For instance, on pp. 64 to 68, the references in relation to Coinage offences are to 24 and 25 Vict., c. 99, which is cited in full only on p. 63; and a similar course is pursued with respect to 24 and 25 Vict., c. 96, in the chapter on Larceny, while occasionally these curtailed references are prefaced by "Ibid." It would have tended to greater clearness, as well as symmetry, if one system had been preserved throughout. A noticeable feature of Mr. Harris's work, which is likely to prove of assistance both to the practitioner and the student, consists of a Table of Offences, with their legal character, their punishment, and the statute under which it is inflicted, together with a reference to the pages where a Statement of the Law will be found.

The Law of Slander and Libel (founded upon the Treatise of the late Mr. Starkie), including the Pleading and Evidence Civil and Criminal, adapted to the present Procedure, with Forms and Precedents. Fourth Edition. By HENRY COLEMAN FOLKARD, Esq., Barrister-at-Law. Butterworth. 1876.

The fourth edition of this well-known work on Slander and Libel, to which circumstances have prevented our according an earlier notice in these pages, reflects great credit upon the learned author by the evidence which it exhibits of laborious carefulness and discriminating judgment, together with their resultant lucidity, accuracy, and comprehensiveness. We use the term "author" instead of "editor" advisedly, because, though founded upon the Treatise of Mr. Starkie, the edition which Mr. Folkard brought out in 1869 was substantially a new work, and the volume now before us contains, we are assured, but "the merest fragment" of the original Treatise published nearly fifty years since. The "Commentary," or "Preliminary Discourse," occupying 64 out of the 900 pages of the work, and certain portions of the text devoted to branches of the Criminal Division now all but obsolete, constitute in fact almost the only survivals. The Law of Libel, in its present form, has grown up by slow degrees. Its history has an interest for the Student of Constitutional Law as well as the ordinary Practitioner; and it is only quite recently, as Mr. Folkard observes, that "some of its most important principles have been fully recognised and established." The Law of Privileged Communication has been a special object

of the author's care in the present edition, the cases concerning it being now for the first time classified and arranged under appropriate headings, setting forth the principles and grounds of privilege applicable to each class. This portion of the work will, we doubt not, prove of great assistance to the Practitioner. A few exceptions to the general carefulness displayed throughout the book have met our eye, but we will only give one specimen, which has a somewhat comic look as a footnote reference. At p. 184 the reader is directed for information as to the case of *Dawkins v. Lord Rokeby, on Appeal*, to "L.R. —; 45 L.J. Q.B. —. And see *infra* the case of *Dawkins v. Paulet*, p. —." At the end of the volume is a collection of thirty-eight useful Precedents, and an Appendix of Statutes. There is a full Table of Cases, and the Index appears to be copious and well executed.

The Doctrines and Principles of the Law of Injunctions. By WILLIAM JOYCE, Esq., of Lincoln's Inn, Barrister-at-Law. Stevens & Haynes. 1877.

Mr. Joyce, whose learned and exhaustive work on "The Law and Practice of Injunctions," has gained such a deservedly high reputation in the Profession, now brings out a valuable companion volume on the "Doctrines and Principles" of this important branch of the Law. In the present work the Law is enunciated in its abstract rather than its concrete form, as few cases as possible being cited; while at the same time no statement of a principle is made unsupported by a decision, and for the most part the very language of the Courts has been adhered to. Written as it is by so acknowledged a master of his subject, and with the conscientious carefulness that might be expected from him, this work cannot fail to prove of the greatest assistance alike to the Student—who wants to grasp principles freed from their superincumbent details—and to the Practitioner, who wants to refresh his memory on points of Doctrine amidst the oppressive details of professional work. We think, however, that Mr. Joyce might, in 1877, have ventured in his text, instead of defining an Injunction as "issuing by the order of a Court of Equity," to have boldly stated there what he merely tells us in a note, that under the Judicature Acts "the power of granting Injunctions has been given to the High Court of Justice."

Elegance of style may not be necessary in a Legal Treatise, but some attention to lucidity and terseness will never be thrown

away. Mr. Joyce seems to have a German belief in long sentences, which we cannot but fear will mar the usefulness of his work. His chapter on Jurisdiction, for instance, opens with a paragraph which is printed as one sentence of fifteen lines, but would be much more intelligible and clear if broken up into three sentences. To show what we mean, we give the paragraph as we should prefer to see it broken up.

"It would seem that a person on whom an injury is fraudulently committed may have a remedy in the Courts of any country where the fraud occurs, and even though he be at the time an alien enemy. Thus a foreign manufacturer has a remedy by suit in this country for an Injunction to restrain the fraudulent appropriation of his trade-mark, and for an account of profits, against a manufacturer in this country who has committed a fraud upon him by using his trade-mark for the purpose of inducing the public to believe that the goods marked are manufactured by the foreigner. This relief is founded upon the personal injury caused to the foreigner by the defendant's fraud, and exists, although he resides and carries on his business in another country, and has no establishment here, and does not even sell, or usually sell, the goods on which such trade-mark is affixed, in this country."

Here it seems to us that the three parts of which the paragraph consists—the Statement of the Rights of Foreigners, the Example, and the Principle of Law, would all be clearly separated, whereas in Mr. Joyce's statement they appear confused. The learned author's grammar appears also to be peculiar; at least we have been unable by any of the ordinary rules to construe his proposition that "An Injunction is a Writ remedial, issuing by the Order of a Court of Equity, in those cases where the plaintiff is entitled to Equitable relief, *by* restraining the commission or continuance of some act of the defendant."

In his present, as in his larger work, Mr. Joyce has paid considerable attention throughout to the American cases on the subject, and his Index is specially remarkable for its analytical fulness.

The Law of Compensation under the Lands Clauses and Railways' Clauses Consolidation Acts, the Artizans' and Labourers' Dwellings Improvement Act, 1875, the Metropolis Local Management and other Acts, &c. By EYRE LLOYD, of the Inner Temple, Barrister-at-Law. Fourth Edition. Stevens & Haynes. 1877.

Not much more than eighteen months have elapsed since we had occasion to review the third edition of this work, and the

demand for a new edition so soon afterwards, justifies at once the favourable opinion which we then expressed, and at the same time, affords a conclusive independent testimony of the high appreciation of the profession. Since the publication of the last edition, recent though it be, several important points on the branch of law of which it treats have been decided, and all these are carefully noted by the Author. Not the least important among them is the judgment of the House of Lords in *Lyon v. The Fishmongers' Company* (the bearings of which were fully discussed in our Nos. for November and February last), by which, reversing the decision of the Lords Justices, it was determined that there is no distinction between the position of a riparian owner of land abutting upon a tidal, and upon a non-tidal river, as far as regards the right of access from the stream to his own land, and *vice versâ*; and that such right of access is a private right, entirely distinct from the public right of navigation, which is common to the riparian owner and the rest of the public. Keeping steadily in view the requirements of practical utility, Mr. Eyre Lloyd has added to the present edition a complete set of forms under the Artizans' and Labourers' Dwellings Improvement Act, 1875, together with a few useful specimens of Bills of Costs; and the "Precedents" appear also to have been carefully revised and adapted to the requirements of the Judicature Acts and Rules.

The Book of Church Law, being an Exposition of the Legal Rights and Duties of the Parochial Clergy and the Laity of the Church of England. By Rev. J. H. BLUNT, M.A. Second Edition. Revised by Walter G. F. Phillimore, D.C.L., Barrister-at-law, Chancellor of the Diocese of Lincoln. Rivingtons. 1876.

A Book of Church Law so convenient in size, and bearing such well-known names as those on the title page of the work before us, can hardly fail to be much sought after by parochial clergy, churchwardens, and even, perhaps, "aggrieved parishioners." The design is an admirable one, and has evidently been the object of much conscientious labour, but we should have liked to see it carried out in a somewhat less antiquarian and more practically useful manner. There is no external evidence to show how much of the new edition should be attributed to Dr. Phillimore's revision, and we can, therefore, only offer some general observations on the principles which appear to have guided the joint editors.

On several important points it seems to us that the information

conveyed is not adequate even, as a summary exposition of Church Law. In treating of the office of churchwarden, for instance, our authors, after stating the law of church-seats thus, "by the Common Law every parishioner is entitled to a seat in his parish church," proceed to assert that whether the assignment of seats to parishioners is made "as a yearly arrangement, whether it is made at the time when divine service is about to be or is being celebrated, or whether the power to make it is only used in disputed cases—the seats being ordinarily considered free, and open to the first comer—are matters entirely within the discretion of the churchwardens, subject to the control of the Ordinary." If the principle be stated in the plainer, and, as we believe, more accurate, language of the Chancellor of the Diocese of Carlisle in his Rules for the Guidance of Churchwardens, "the parish church is, in its use, the property of the whole parish, and the inhabitants generally have all an equal right in it," the powers of a churchwarden would seem to be most properly exercised in seating parishioners service by service. Who are the electors of the churchwardens is clearly stated in a recent opinion by Dr. Stephens and Mr. F. H. Jeune, who say, "Substantially, the qualification is the having been rated to the last poor-rate, or liability and consent to be rated," and refer to 58 Geo. III., c. 69, amended by 59 Geo. III., c. 85, and 16 & 17 Vict., c. 65, as determining the qualification. Mr. Blunt and Dr. Philimore tell us that the "ordinary law by which the appointment of churchwardens is regulated is the 89th Canon," and do not give any reference to these Statutes under that head, only introducing them much later on, s. v. "Vestries."

Our authors seem to entertain a high opinion of the value of presentments. We fear that a churchwarden in London or Liverpool who should try to make due presentment of "notorious sinners" in the sense of the 26th Canon, who "offend their brethren," though it were but "by drunkenness or swearing," to leave out weightier matters, would rue the day when they undertook such a fearful task. And we doubt whether such presentments would be made "with advantage to religion." We have to remark upon a somewhat heavy admixture of the theological and doctrinal element in the "Book of Church Law." After having correctly stated the language of the Prayer-Book bearing upon the minister of baptism as showing that the "things essential to this sacrament" are the "matter" and the "words," our authors carry us into an entirely different and non-legal field when they proceed to assert that a lay person baptising "is

guilty of no small sin." Mr. Blunt and Dr. Phillimore might naturally be expected to be strong in Conciliar lore. Indeed, they quote Canons and Constitutions of every conceivable Council and Synod, and of very varying value. But we fail to see the use of quoting a Constitution of Canterbury, A.D. 1378, "Confessiones ter in anno audiantur," and informing us that "there is in existence a Canon of 1220, which provided that if a child remained unconfirmed beyond seven years of age neither its father nor its mother should enter the Church until the rite had been performed." If our authors wish to revive these and such like provisions they have more than a life's work before them; but it would be work more pertinent to a plea for Mediæval Church Discipline than to an "Exposition of Church Law."

A Treatise on Banking Law. By J. DOUGLAS WALKER, Barrister-at-Law. Stevens & Sons. 1877.

In the short compass of less than two hundred pages, Mr. Walker offers to the Legal Profession a convenient practical summary of the effect of the most recent Acts and decisions on the principal points that arise in Financial Law. It would be not unnatural to suppose that in a work of this kind we should obtain a definition of the elements that constitute a "Banker" in the eyes of the Law. This, however, seems still to a certain extent to be a desideratum. By the 45th Sect. of the Stamp Act, 1870 (32 & 34 Vict., c. 97), quoted by Mr. Walker (p. 8), it is enacted that "the term banker means and includes any corporation, society, partnership and persons, and every individual person, carrying on the business of banking in the United Kingdom." But what is the definition, if any, of "the business of banking?" We could wish that Mr. Walker had given us some light on this point. It might be asked, for instance, is an Army Agent, receiving and holding moneys of an officer to whose regiment he is agent, and giving his customer cheque-books by means of which to draw upon him, a "Banker" within the meaning of the definition just cited? And if not, why not? These are questions quite within the scope of Mr. Walker's Treatise, and we hope he may consider them in a future edition of his present useful contribution to the Legal Literature of Banking.

The Merchant Shipping Laws; being a Consolidation of all the Merchant Shipping and Passenger Acts, from 1854 to 1876 inclusive, with Notes of all the leading English and American

Cases on the Subjects affected by Legislation. By A. C. BOYD, LL.B., Barrister-at-Law. Stevens & Sons. 1876.

When we consider that the Act which came into operation on the 1st October, 1876, is the fifteenth dealing with our Merchant Shipping which has been passed since 1854, and that the Act of 1854 itself repealed and consolidated all previous legislation on the subject, it is not too much to say that we are practically in possession of a Code of Maritime Commerce. It has been Mr. Boyd's object so to deal with the various Maritime Enactments, as to present for the use both of the practising Barrister, the Shipmaster, and the Consular Officer, a general view of the Enactments which they have to interpret or apply. This "conspicuous" Mr. Boyd has thought, wisely as we believe, that he could best give by throwing the whole of the Legislation on Maritime matters as nearly as possible into the shape of a Code, indicating the Sections of the principal Act, that of 1854, in bold figures, at the top of the margin of each page, and illustrating the text, wherever necessary, by references to, or embodiments of, decided cases, both British and American, and placing under the Sections of the principal Act, the relative sections of the subsequent Acts, or the Orders in Council altering or explaining the original Act. The subject with which Mr. Boyd deals is one that affects very large interests, and our Legislation upon it has naturally attracted attention in foreign countries. The Society of Comparative Legislation in Paris, at one of its recent meetings, reported in its "Bulletin" for June, 1877, devoted a considerable portion of an evening, to hearing and discussing a Paper, in which M. Algernon Jones, Advocate of the Court of Appeal in Paris, expounded the chief points of the Act of 1876. The right of arrest of a ship pronounced unseaworthy by the Agents of the Board of Trade has, it appears, nothing analogous to it in French Legislation. One feature of the Act of 1876, that which gives "one of Her Majesty's Principal Secretaries of State" power to appoint as an Assessor "any person or persons, on the recommendation of a Foreign State" (39 and 40 Vict., c. 80, s. 7), was justly characterised by M. Jones, as having an International importance, and making a beginning of an International agreement on measures for the protection of Mercantile shipping. The fact that a Foreign Assessor may be appointed, is not brought out in Mr. Boyd's generally excellent Index.

. Pressure on our space compels us to postpone several Reviews and Notices of Smaller Books and Pamphlets.

Books Received.

We have to acknowledge the receipt of the following :—

- Palmer's Company Precedents.* Stevens & Sons. 1877.
Der Begriff der Strafe. Zurich: Orell Fussli. (London: Nutt.) 1877.
Rumsey's Chart of Hindu Inheritance. W. H. Allen. 1877.
Burton's Increase of the Episcopate and Congé d'Elire. J. Parker & Co. 1877.
Lawrence's Sale Under Partition Acts. Butterworths. 1877.
Revised Statutes. Vol. XII. Eyre & Spottiswoode. 1877.
Wharton's Law of Evidence. London: Trübner. Philadelphia: Kay.
Smith's Mercantile Law. 9th Edition. Stevens & Sons. 1877.
Case of Lord H. Seymour's Will. Stevens & Haynes. 1877.

We have also received to date :—

- The American Law Review.* Boston: Little, Brown & Co.
The Southern Law Review. St. Louis: G. I. Jones & Co.
The Albany Law Journal. Albany, N.Y.
The Canada Law Journal. Toronto.
The Scottish Law Magazine. Edinburgh: T. & T. Clark.
The Irish Law Times. Dublin.
The New Zealand Jurist. Dunedin, N.Z.
The Foreign Church Chronicle. London: Wells Gardner.
Journal de Droit International Privé. Paris: Marchal, Billard et Cie.
Revue de Droit International. Gand. No. IV. 1876-7.
Rivista di Discipline Carcerarie. Rome.
Revue Générale du Droit, &c. Paris: E. Thorin.
Nouvelle Revue Historique de Droit. Paris: Larose
Circolo Giuridico. Palermo. 1877. Nos. I. & II.
Boletín de la Institucion Libre de Ensenanza. Madrid. 1877. Nos. I.—V.

Legal Obituary of the Quarter.

April.

- 19. BATT, Henry, Esq., Solicitor, aged 63. Admitted 1846.
- 30. BROOKE, Zachary, Esq., Solicitor, aged 73. Admitted 1825.
- 30. GREGORY, William, Esq., Solicitor, Leicester, aged 74. Admitted 1829.
- 23. GRIFFITH, George, of the Middle Temple, Esq., Barrister-at-law, aged 88. For many years Recorder of Denbigh. Called 1830.
- 6. HOLLWAY, John Hardwick, Esq., Solicitor, Louth, aged 81. Admitted 1818.
- 23. KENNEDY, William, Esq., W.S. (Scot.), aged 76. Admitted 1827.
- 23. MORPHY, Edward, Esq., Solicitor (Irel.), aged 66.
- 21. NORTHALL-LAURIE, Peter, of Lincoln's Inn, Esq., Barrister-at-law, B.A., St. Peter's Coll., Cam., 1830, LL.D., 1872, aged 69. Called 1833.
- 24. SAXELBYE, John, Esq., Solicitor, Hull, aged 71. Admitted 1829.
- 22. WESTON, James Woods, Esq., Solicitor, Manchester, aged 74. Admitted 1827.

May.

- 20. ARNOLD, Thomas James, of Lincoln's Inn, Esq., Barrister-at-law, F.R.S., Senior Metropolitan Police Magistrate, aged 73. Called 1829. Eldest son of the late Samuel James Arnold, Esq., J.P., for Middlesex and Westminster, by Matilda Caroline, daughter of the late Henry James Pye, Esq., M.P., Poet Laureate. Appointed by the late Lord Brougham a Commissioner of Bankruptcy at Liverpool, but subsequently returned to practice at the bar. He was for many years a Revising Barrister until his appointment, in 1847, as Metropolitan Police Magistrate at Worship Street, whence he was removed, in 1851, to Westminster. Author of "Municipal Corporations," "Justices of the Peace out of Session," "The Labour Laws," &c.
- 5. CUMMING, Gordon, Esq., Solicitor, aged 36. Admitted 1863.
- 8. CUNNINGHAM, William Crozier, Esq., Solicitor (Irel.), Clerk of the Peace for Belfast, aged 49. Admitted 1850.
- 23. EVANS, Frederic Hodgson, of the Middle Temple, Esq., Barrister-at-law. Called 1843.
- . HACKETT, Sir William, Chief Justice of Ceylon, aged 53. Born 1824. Educated at Stonyhurst and at Trin. Coll. Dublin (B.A. 1846). Called to the Irish Bar, and subsequently, in 1851, to the English Bar, by the Hon. Soc. of Lincoln's Inn. Queen's

Advocate on the Gold Coast, 1861; and Acting Chief Justice, 1861-63; Lieut.-Governor of the Gold Coast, 1864; Recorder of Prince of Wales's Island, 1866 (when he received the honour of knighthood); and subsequently Judge of Penang; Acting Chief Justice of the Straits Settlements, 1871; succeeded Sir George Anderson as Chief Justice of Ceylon, 1876.

20. HAYWARD, Thomas, Esq., Solicitor, Manchester. Admitted 1859.

26. INNES, Frederic Stocks Bentley-, of the Middle Temple, Esq., Barrister-at-law, J.P., and D.L., for Caithness-shire, aged 40. Called 1859.

23. KILKELLY, James Joseph, Esq, Solicitor (Irel.), J.P., Chairman of the Nenagh Town Commissioners, aged 59.

17. LANGHORNE, John Bailey, Esq., Solicitor, Wakefield, District Registrar of Court of Probate, and J.P. for Co. Berwick, aged 61. Admitted 1839.

12. LOVELL, Edwin, Esq., Solicitor, Clerk of the Peace for Co. Somerset, aged 70. Admitted 1831.

1. MERRIFIELD, John, of the Middle Temple, Esq., Barrister-at-law, aged 88. Called 1828.

22. POLLOCK, John, Esq., Solicitor, (Irel.), B.A., aged 71.

3. ROWCLIFFE, Charles Edward, Esq., Solicitor, Stogumber, aged 54. Admitted 1843.

1. SEEDS, Henry, Esq., Solicitor, (Irel.), aged 62.

1. SHERRIE, James Pollock, Esq., Solicitor, (Irel.), aged 34.

31. TAAFFE, Patrick Augustus, Esq., Solicitor, (Irel.)

22. TAIT, John, Esq., Advocate, aged 82. The deceased, who was the eldest brother of the present Archbishop of Canterbury, was called to the Scottish bar in 1819, and subsequently appointed Sheriff of the united counties of Clackmannan and Kinross, and afterwards of Perthshire. Vice-Dean of the Faculty of Advocates, 1868, in succession to Lord Manor.

17. WHITMORE, Charles Shapland, Esq., Q.C., Bencher of the Inner Temple, and Judge of the Southwark County Court, aged 72. Educated at Rugby and Trin. Coll. Cam.; B.A., 1827; M.A., 1830; in which latter year he was called to the bar.

16. YOUNG, James, Esq., S.S.C., (Scot.), Secretary to the Society of Solicitors before the Supreme Courts of Scotland, of which he had become a member in 1859.

June.

19. BAILEY, John, Esq., Q.C., Bencher of Lincoln's Inn, M.A., St. John's Coll. Cam., and second wrangler, 1828. Called 1832; Q.C., 1851.

19. CAMPBELL, Robert, of Sonachan, Esq., W.S., (Scot.), aged 98, was the Father of the Society of Writers to Her Majesty's Signet, having been admitted 1805; J.P. and D.L. for County Argyll.

9. CORCORAN, Lawrence William, Esq., Solicitor, (Irel.), aged 67.

23. EDWARDS, John Hawley, Esq., formerly of Shrewsbury, Solicitor, aged 66.

11. GOULBURN, Frederick Anderlecht, of the Inner Temple, Esq., Barrister-at-law, M.A. and late Fellow of All Souls, Oxford, aged 59. Son of the late Mr. Serjeant Goulburn, M.P.

12. HALDANE, Robert, Esq., W.S. (Scot.), J.P. for Perthshire and Forfarshire, aged 72. Admitted 1829.

9. HAMILTON, Right Hon. Robert Adam Christopher Nisbet, Advocate, J.P. and D.L. for Lincolnshire and Haddingtonshire. Eldest son of the late Philip Dundas, Esq., and grandson of the late Lord President Dundas of Arniston. Educated at Edinburgh University. Called to the Scottish bar 1826. M.P. for Ipswich, 1826-30, and 1835-37; for Edinburgh, 1831-2; and for North Lincolnshire, 1837-57; Chancellor of the Duchy of Lancaster, 1852. Assumed the name of Christopher, in lieu of Dundas, in 1836, and the name of Nisbet-Hamilton in 1854, on the accession of his wife (Lady Mary Bruce, eldest daughter of Thomas, seventh Earl of Elgin), to the Dirleton and Belhaven Estates.

27. HAWKINS, John Heywood, Esq., Barrister-at-law, M.A., Trin. Coll. Cam., aged 75. M.P. for the now disfranchised borough of St. Michael's, Cornwall, 1830-31; for Tavistock, 1831-2; for Newport, I.W., 1832-41.

14. HAYWARD, Edward, of the Middle Temple, Esq., Barrister-at-Law. Called 1836.

16. HEPWORTH, John Tuer, Esq., Solicitor, aged 27. Admitted 1871.

4. HUNT, Charles, Esq., Solicitor, formerly of Wednesbury, aged 75.

25. HUNT, James, Esq., Solicitor, Cambridge, aged 69. Admitted 1833.

24. LE MOTTÉE, Arthur James, of the Inner Temple, Esq., Barrister at-law, B.A., Caius Coll. Cam., aged 30. Called 1872.

15. MELLISH, Right Hon. Sir George, Lord Justice of the Court of Appeal, aged 63. Second son of the late Very Rev. Edward Mellish, Dean of Hereford, by Elizabeth Jane, eldest daughter and co-heiress of the late Very Rev. William Leigh,

of Rushall Hall, Staffordshire, Dean of Hereford. Born 1814. Educated at Eton and Univ. Coll. Oxon. (B.A. 1837, M.A. 1839). Practised as a special pleader 1840-8, in which latter year he was called to the Bar by the Inner Temple, and went the Northern Circuit. Q.C., 1861. Appointed a Lord Justice of Appeal in the High Court of Chancery, 1870.

20. MORRISON, John, Esq., Advocate (Scot.) Called 1855.

13. QUINLAN, James William, Esq., Solicitor (Irel.).

18. RICE, Michael, Esq., Solicitor (Irel.).

4. ROBINSON, Henry Meggison, Esq., Solicitor, Bristol, aged 48. Admitted 1852.

17. TINCLER, Francis Green, Esq., Solicitor (Irel.).

27. TOMLINSON, Thomas, of the Middle Temple, Esq., Barrister-at-law, M.A., Trin. Coll. Dub., aged 39.

1. WARNER, John, of the Inner Temple, Esq., Barrister-at-law, aged 71. Called 1830.

2. WASON, James, Esq., Solicitor, Birkenhead, Registrar of Birkenhead County Court, aged 72. Admitted 1829.

8. WILKINSON, Thomas, Esq., Solicitor, Canterbury, aged 80. Admitted 1833.

July.

8. ALLOWAY, Robert Morellet Montgomerie, Esq., Barrister-at-law (Irel.), M.A., Trin. Coll. Dub., J.P. for Queen's County, aged 70.

14. CARRICK, William, Esq., Solicitor, Coroner for the Eastern Division of Cumberland, aged 73. Admitted 1827.

5. COOKSON, William Strickland, Esq., Solicitor, aged 77. Admitted 1823. For many years Treasurer of the Social Science Association, and Representative of the Incorporated Law Society on the Council of Law Reporting.

4. JACKSON, William Henry, Esq., Solicitor (Irel.), aged 66.

8. MARSHMAN, John Clark, Esq., Barrister-at-law, C.S.I., of Serampore, India. Eldest son of the well-known Dr. Marshman, Baptist Missionary there, and brother-in-law of the late General Sir Henry Havelock. Founder of the first Bengalee newspaper, and of the "Friend of India," the first English weekly in India. Besides his great work the "History of India," he was author of a "Guide to the Civil Law," and other popular Anglo-Indian law works.

6. PHILPOT, Henry, Esq., Solicitor. Admitted 1863.

10. SHEIL, Joseph Robert, Esq., M.A., LL.B., Solicitor (Irel.), aged 28.

17. WHITE, Patrick A., Esq., Solicitor (Irel.), aged 30.

THE
LAW MAGAZINE AND REVIEW
Quarterly Digest
OF
ALL REPORTED CASES,
IN THE
LAW REPORTS, LAW JOURNAL REPORTS, LAW TIMES
REPORTS, AND WEEKLY REPORTER,
WITH
TABLE OF CASES AND INDEX OF SUBJECTS.
AUGUST 1876—AUGUST 1877.

BY
L. G. GORDON ROBBINS, B.A., Oxon,
Of Lincoln's Inn, Esq., Barrister-at-Law.

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1877.

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Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

**Law Reports, Law Journal Reports, Law Times Reports,
and Weekly Reporter,**

FOR AUGUST, SEPTEMBER, AND OCTOBER, 1876.

By L. G. GORDON ROBBINS, Barrister-at-Law.

Administration;

- (i.) C. P. Div.—*Account—Counter-claim.*—An administrator may maintain an action for the whole of a debt due to the intestate, and when an order has been made in the Chancery Division for an account, the debtor cannot set up a counter-claim in respect of a debt due to him from the estate, but must prove for it in the Administration action.—*Newell v. National Provincial Bank*, L.R. 1, C.P.D. 496; 45 L.J., C.P. 286; 24 W.R. 458.
- (ii.) Ch. Div. V. C. B.—*Costs—Probate—Jurisdiction.*—The House of Lords in an appeal from the Probate Court, ordered the costs to be paid out of the estate: *Held* that the Court of Probate having jurisdiction only over personalty, such costs could not be charged on the real estate.—*Charter v. Charter*, 45 L.J., Ch. 705; 84 L.T. 412; 24 W.R. 874.
- (iii.) P. D. & A. Div.—*Injunction.*—Plaintiff claimed administration as next of kin of intestate; defendant, who alleged herself to have been the wife of deceased, possessed herself of his personalty; on ex parte application of plaintiff after issue of writ, but before service, Court granted an injunction to restrain defendant from dealing with the property until further order.—*Brand v. Mitson*, L.J. 45, P.D. A. 41; 84 L.T. 854; 24 W.R. 524.
- (iv.) P. D. & A. Div.—*Limited Grant.*—Where an executor's executor was out of the jurisdiction, the Court granted administration with the will annexed to the nominee of parties interested, limited to a particular fund.—*In the goods of Grant*, 45 L.J., P.D. A. 88; 24 W.R. 929.
- (v.) P. D. & A. Div.—*Limited Grant.*—Administration of estate of A. was granted to B. a creditor who became bankrupt; B.'s trustee assigned the debts due from his estate to C., also a creditor; a grant de bonis was made to C. limited to B.'s interest.—*In the goods of Budett*, 45 L.J. P.D.A. 71; 84 L.T. 855.
- (vi.) Ch. Div.—*Partnership.*—Where a partner since deceased had misappropriated partnership property: *Held* that the trustee in Bankruptcy of the surviving partners was entitled to prove against the separate estate of the deceased partner for the amount misappropriated.—*Lacey v. Hill, Bailey's claim*. 85 L.T. 149.
- (vii.) Ch. Div. V. C. H.—*Real Estate—Sale.*—Where the executrix of a deceased trustee who had committed a breach of trust admitted assets, but afterwards withdrew admission: *Held* that cestuis que trustant, who

A

had instituted an administration suit were entitled to file a petition under 13 & 14 Vict. c. 86, s. 55, for sale of deceased trustee's real estate before the chief clerk had made his certificate as to the amount of liability.—*Bell v. Turner*, L.R. 2 Ch. D. 409; 45 L.J. Ch. 681; 24 W.R. 451.

Agreements and Contracts :—

- (i.) **H. L.—Agency.**—Where two persons agree that, for a fixed time, one shall employ the other as sole agent at a certain place, and that the latter will not act there for any other principal, there is no implied contract that the employer will not part with the business during the time named.—*Rhodes v. Forwood*, L.R. 1, App. 256; 84 L.T. 890; 24 W.R. 1078.
- (ii.) **C. P. Div.—Breach of Contract.—Measure of damages.**—Plaintiff contracted to construct a tramway, and made a sub-contract with defendants whereby they agreed to lay down and maintain in good repair asphalt on the roadway; in consequence of defective state of the asphalt, H. was injured and brought action. Plaintiff called on the defendants to defend the action, and on their refusal resisted and afterwards compromised it for £70; he had also to pay £58 for costs of the litigation; the jury found that the resistance and ultimate compromise were reasonable. *Held* that the defendants were liable for the £70 but not for the costs, as not being "natural or necessary consequence of their default."—*Fisher v. Val de Travers Asphalt Co.*, L.R. 1 C.P.D. 511.
- (iii.) **C. P. Div.—Building Contract.**—*Held* on the construction of a building contract, that clauses with reference to avoidance of the contract and forfeiture of implements and materials, could only be enforced before the time originally fixed for completion of the works had expired.—*Walker v. London & North Western Railway Co.*, L.R. 1, C.P.D. 518.
- (iv.) **Ex Div.—Construction.**—E. S., a widow, being unable to pay her debts to plaintiff, it was agreed that in consideration of regular payment of interest thereon, he would forego his claim to the principal during her life, and her daughters agreed to pay the principal "out of her estate at her decease": the widow had then or thereafter no property except a life estate in freehold property, of which the daughters at her death became tenants in common in fee: *Held* that plaintiff having brought an action on the daughters' undertaking was rightly non-suited.—*Brown v. Fletcher*, 85 L.T. 165.
- (v.) **Q. B. Div.—Construction—Arbitration.**—Defendants sold to plaintiff certain goods guaranteeing their quality: it was also agreed that in case of dispute arising out of the contract the matter should be referred to arbitration within 14 days of landing: *Held* on construction of the contract that the agreement to refer was a condition precedent to action for damages.—*Pompe v. Fuchs*, 84 L.T. 800.
- (vi.) **Q. B. Div.—Contract of sale.**—Contract for sale of goods to be shipped "in the months of March ^{or} April"; the goods were actually shipped in February: *Held* that consignee was not bound to accept the goods.—*Shand v. Bowes*, L.R. 1 Q.B.D. 470; 45 L.J. Q.B. 507; 84 L.T. 795; 24 W.R. 784.
- (vii.) **C. P. Div.—Contract of Sale.**—Vendor of goods contracted in writing to deliver them "75 tons at once, and 75 in July next." By end of July only 75 tons had been delivered; in October, at verbal request of defendant, goods were forwarded to him, but were not accepted: *Held* that no action was maintainable under the original contract, nor was there any new contract to support action for goods sold and delivered.—*Plevins v. Downing*, L.R. 1 C. P. D. 220; 45 L.J. C.P. 695; 85 L.T. 263.
- (viii.) **Ex. Div.—Contract of Sale—Strike.**—Plaintiffs contracted to supply coals daily to defendants, vendors not being bound to keep up deliveries in event of a colliers' strike: on 28th of March a strike was brought about, owing to reduction of colliers' wages by plaintiffs, and the pits

remained closed till 28th July: *Held* that defendants could not repudiate the contract, but must accept undelivered coal.—*King v. Parker*, 84 L.T. 887.

- (ix.) *Contract of Sale—Unpaid Vendor—Lien—Estoppel.*—Defendants sold goods to B. & Co., and delivered to them a written undertaking to deliver the same to order. B. & Co. sold to plaintiffs and received the price, and afterwards failed: *Held* that the undertaking did not estop defendants from setting up their lien as unpaid vendors.—*Farmiloe v. Bain*, L.R. 1, O.P.D. 445; 45 L.J. O.P. 264; 84 L.T. 324.
- (x.) *Ch. Div. M. R.—Rescission.*—An Actress having been engaged by defendants to perform in a new Opera, was unable through illness to perform on the opening or earlier nights, whereby the manager was obliged to engage another actress to take the part: *Held* that the failure of consideration justified defendants in rescinding the contract.—*Pousard v. Spiers*, L.R. 1, Q.B.D. 410; 45 L.J. Q.B. 621; 84 L.T. 578; 24 W.R. 819.
- (xi.) *C. A.—Specific Performance.*—Defendant verbally agreed to purchase a horse, his solicitor next day wrote a letter stating terms of arrangement, enclosing draft contract for perusal: *Held* that the solicitor's letter was not a memorandum of agreement under Statute of Frauds, and that specific performance could not be decreed.—*Smith v. Webster*, L.R. 3, Ch. D. 49; 45 L.J. Ch. 480; 85 L.T. 44; 24 W.R. 894.
- (xii.) *C. A.—Specific performance.*—Where demurrer to bill for specific performance on ground that agreement is invalid under Statute of Frauds, has been overruled, the defence of the Statute, only raised by demurrer, may be relied on.—*Johnassen v. Bonhote*, L.R. 2, Ch. D. 298; 45 L.J. Ch. 651; 84 L.T. 745; 24 W.R. 619.

Arbitration:—

- (i.) *Q. B. Div.—Submission.*—*Held* that Common Law Procedure Act, 1854, s. 11, does not affect right of either party to revoke submission not made rule of Court.—*Randall v. Thompson*, 45 L.J. Q.B. 718; 83 L.T. 193; 24 W.R. 665.

Banker:—

- (i.) *Ex. Div.—Cheque.*—A cheque crossed L. & O. Bank drawn by plaintiff on W. & Co. his bankers, was stolen and paid with forged indorsement to defendant by a customer: defendant presented the cheque through bankers other than the L. & O. Bank to W. & Co., who paid it; the jury found that all parties except defendant had acted negligently. *Held* that defendant was liable to plaintiff for amount of the cheque.—*Robbett v. Pinkett*, L.R. 1 Ex. D. 368; 45 L.J. Ex. 555; 84 L.T. 851; 24 W.R. 711.
- (ii.) *C. P. Div.—Cheque.*—*Held* that a signature "S. & Co. per S.K. agent" endorsed on a cheque payable to S. & Co., was a signature "per procurationem," and that bankers paying such cheque were protected by 16 & 17 Vict. c. 59, s. 19.—*Charles v. Blackwell*, L.R. 1 O.P.D. 548; 45 L.J. C.P. 542; 85 L.T. 162; 24 W.R. 737.
- (iii.) *H. L.—Cheque.*—M. on 11th of February purchased of L. foreign bills at 15 days' date, which, by custom of the trade were payable on the 14th of February; L. being indebted to plaintiffs, his bankers, gave them a stamped paper dated 14th of February requesting M. to pay to them the price of the bills, and M.'s agent accordingly handed to them a cheque for the amount, but, L. having stopped payment that day, he directed his bankers not to pay the cheque; the bills were dishonoured. *Held* that the bills notwithstanding their subsequent dishonour were a good consideration for the cheque, and that plaintiffs had a lien thereon for L.'s antecedent debt.—*Misa v. Currie*, 24 W.R. 1049.
- (iv.) *C. P. Div.—Draft—Forged endorsement.*—A draft specially endorsed was stolen and presented with forged endorsement at bank of defendants who

procured the money for the presenter: *Held* that defendants were not protected by 16 & 17 Vict. c. 59, s. 19, from liability to account to the last rightful holder of the draft.—*Arnold v. Cheque Bank, Arnold v. City Bank*, L.R. 1, C.P.D. 578; 45 L.J. C.P. 562; 84 L.T. 729; 24 W.R. 759.

Bankruptcy:—

- (i.) **C. J. B.**—*Act of Bankruptcy*.—A. gave B. a bill of sale over all his property to secure a past debt, and also a further advance to enable A. to meet a bill to which he had forged B's name: B. sold the property under the bill of sale, and A. was subsequently adjudicated bankrupt: *Held* that the bill of sale being given to compound a felony was absolutely void and an act of bankruptcy.—*Ex parte Caldecott, Re Mapleback*, 85 L.T. 172.
- (ii.) **C. A.**—*Act of bankruptcy—Bill of sale*.—Trader agreed with his brother to execute bill of sale to secure past debt and further advance of £150; three advances of £50 were made at intervals and on last advance the bill of sale was executed; the brother subsequently made a further advance of £100 and a month later a creditor presented a petition for adjudication on the ground that the bill of sale was an act of bankruptcy: *Held* that the execution of the bill of sale was not an act of bankruptcy.—*Ex parte King, Re King*, L.R. 2, Ch. D. 256; 45 L.J. Bptcy. 109; 84 L.T. 486; 24 W.R. 569.
- (iii.) **C. A.**—*Act of Bankruptcy—Notice*.—A creditor who receives notice of debtor's intention to commit act of bankruptcy is not bound to inquire whether such act has been committed, but may avail himself of his remedies notwithstanding such notice.—*Ex parte Arnold, Re Wright*, L.R. 8, Ch. D. 70; 45 L.J. Bptcy. 180; 85 L.T. 21; 24 W.R. 977.
- (iv.) **C. A.**—*Adjudication*.—Where adjudication of bankruptcy was made, the alleged act of bankruptcy being the execution of a bill of sale, *Held* that the holder of the bill was entitled to appeal from the adjudication. *Ex parte Ellis, re Ellis*, L.R. 2 Ch. D. 797; 84 L.T. 705.
- (v.) **C. J. B.**—*Adjudication*.—Debtor's solicitor by mistake omitted to give notice of intention to dispute debt, but at the hearing applied for leave to do so, and for adjournment; county court judge refused and adjudicated the debtor bankrupt: *Held* that adjudication must be annulled.—*Ex parte Dale, Re Dale*, 45 L.J. Bptcy. 129; 84 L.T. 745; 24 W.R. 852.
- (vi.) **C. J. B.**—*Attachment*.—The Court will in no case dispense with the three days' notice of an application to commit required by Bankruptcy Rules, 1870, r. 179.—*Re Bryant*, 85 L.T. 178.
- (vii.) **C. J. B.**—*Bill of Sale—Trustee in liquidation*.—Debtor, by unregistered bill of sale, assigned all his property to A.; by a subsequent registered bill of sale he assigned it to B. and then filed a petition for liquidation: *Held* that after the petition A's security was gone, and B, having a good bill of sale, was entitled against the trustee.—*Ex parte Cochrane, Re Barraud*.—45 L.J. Bptcy. 122; 84 L.T. 95J.
- (viii.) **C. A.**—*Bill of Sale—Trustee in liquidation*.—A. assigned furniture, by unregistered bill of sale; default having been made, creditor demanded the furniture and threatened to take it by force from the owner of a house where A. had placed it. A., however, did not deliver up the goods until she filed a petition for liquidation: *Held* that the goods were in possession of A. within 17 & 18 Vict. c. 86, and that the trustee in liquidation was entitled.—*Ancona v. Rogers*, L.R. 1 Ex. D. 285; 85 L.T. 115; 24 W.R. 1000.
- (ix.) **C. J. B.**—*Composition—Costs*.—The Court of Bankruptcy has jurisdiction to order taxation of costs in composition cases.—*Ex parte Shepherd, Re Dixon*, 24 W.R. 981.
- (x.) **C. P. Div.**—*Composition—Debtors' Statement*.—Under Bankruptcy Act 1869, s. 126, Creditors assenting to Composition are bound, though their names, &c., are not inserted in debtor's statement; also, where a sum

sufficient to satisfy the composition has been paid to the trustees no directions of the debtor with regard to it are valid, nor will non-payment by trustee of assenting creditors' composition in consequence of such directions entitle the creditor to sue the debtor.—*Campbell v. Im Thurn*, L.R. 1, C.P.D. 267; L.J. 45, C.P. 482; 35 L.T. 265; 24 W.R. 675.

- (xi.) **C. J. B.**—*Composition—Judgment Creditor*.—Notice of application for an injunction to restrain a judgment creditor is properly served when sent by post.—*Ex parte Manthner, Re Lewis*, L.R. 3, Ch.D. 118; 45 L.J. Bpoy. 125; 34 L.T. 662.
- (xii.) **C. J. B.**—*Composition—Proof*.—W. supplied C. with ale on terms of monthly cash payments and 20 per cent discount; C. made monthly payments by acceptances which were dishonoured, and then filed petition, under which resolutions for composition were passed: *Held* that W. was entitled to prove for the full amount without deducting discount.—*Ex parte Worthington, Re Cumberland*, 45 L.J. Bpoy. 185; 34 L.T. 951.
- (xiii.) **C. A.**—*Composition—Registration of Resolutions*.—The power of a majority of creditors to accept a composition under Bankruptcy Act 1869, s. 126, must be exercised *bonâ fide* only for benefit of the creditors, and registrar rightly refused to register a resolution to accept 1s. in the pound where the debtor's assets could have produced 5s.—*Ex parte Page*, I.R. 2, 2 Ch. D. 214; 45 L.J. Bpoy. 119; 34 L.T. 638; 24 W.R. 502.
- (xiv.) **C. J. B.**—*Costs*.—Petition for adjudication having been adjourned at debtor's request, the creditors resolved on liquidation by arrangement: registrar disallowed petitioning creditor's costs of debtor's summons: *Held* that the taxation must be reviewed, and the costs allowed.—*Ex parte Jeavons. Re Bunnett*, 45 L.J. Bpoy. 128; 34 L.T. 804; 24 W.R. 851.
- (xv.) **C. A.**—*Debtor's Summons*.—A resolution for suspension of bankruptcy does not, until discharge of bankrupt, take away right of assignee to after-acquired property of the bankrupt, nor has an uncertificated bankrupt a right to sue out a debtor's summons.—*Ex parte Carter, Re Carter*, L.R. 1, Ch. D. 806.
- (xvi.) **C. A.**—*Debtor's Summons—Service*.—Where a creditor employed a London solicitor, service of a debtor's summons by the clerk of his country agent was held good.—*Ex parte Lancaster, Re Lancaster*, 34 L.T. 951; 24 W.R. 1010.
- (xvii.) **C. A.**—*Injunction—Third party Order*.—Goods were delivered to C. & Co., who, before payment, became bankrupt: vendors commenced action against S. & Co. as having authorised the purchase either on joint account or as undisclosed principals: S. & Co. served notice under Judicature Act, 1875, Ord. 16, r. 18, on the trustee that they claimed to be indemnified: *Held* that the Court of Bankruptcy had no power to restrain the proceedings under Ord. 16 by injunction.—*Ex parte Smith, In Re Collie*, 45 L.J. 1, Bpoy. 116.
- (xviii.) **C. J. B.**—*Lien—Agent*.—A., a timber merchant at S., agreed with F. & Co. that they should carry on his business under his name, and consign timber to him for sale. A. was to manage the business, and receive part of the profits, both A. and F. & Co. having gone into liquidation: *Held* that the trustee of A.'s estate was entitled as against the trustee of F. & Co.'s estate to timber of F. & Co. in possession of A. at commencement of liquidation.—*Ex parte Buck, Re Faucus*, 34 L.T. 807.
- (xix.) **C. A.**—*Lien—Banker*.—By Articles of Association it was provided that shares in a bank should be subject to lien for debts due from the holders, and that none but registered holders should be recognised as owners; at the time of the bankruptcy of a firm, one of the partners who was indebted to the bank was the registered holder of shares, which were, in fact, partnership property: *Held* that the bank could not prove against

- the joint estate without deducting the value of the shares.—*Ex parte the Manchester and County Bank, In Re Collie*.—35 L.T. 23; 24 W.R. 1035.
- (xx.) **C. A. Lien—Packer.**—A packer by custom of the trade has a general lien on all goods of customer for all moneys due from that customer.—*Ex parte Shubrook, Re Witt*, L.R. 2, Ch. D. 489; 45 L.J. Bpoy. 118; 84 L.T. 785.
- (xxi.) **C. J. B.—Lien—Solicitor.**—A solicitor acted for mortgagor and mortgagee, having at the time a lien on the mortgagor's deeds, which, on completion of the mortgage, he continued to hold: mortgagor having filed a petition for liquidation, the same solicitor acted for the trustee: on sale of equity for redemption of the property, *Held* that the solicitor had a lien on the deeds.—*Ex parte Calvert. Re Messenger*, 45 L.J. Bpoy. 184; 84 L.T. 920.
- (xxii.) **C. J. B.—Liquidation—Arbitration.**—Where in a liquidation there is a reference to arbitration, County Court Judge has jurisdiction under Bankruptcy Rules, 1870, r. 166, to compel by subpoena the attendance of witnesses before the arbitrator.—*Ex parte Bolland. Re Ackary*, L.R. 3, Ch. D. 125; 45 L.J. Bpoy. 133; 84 L.T. 666; 24 W.R. 932.
- (xxiii.) **C. J. B.—Liquidation—Examination.**—When debtor has made his statement, and been examined at a creditor's meeting, some default by him must be proved before he can be compelled to give further information under R. 301.—*Ex parte Glave. Re Bennett*, 45 L.J. Bpoy. 126; 84 L.T. 949.
- (xxiv.) **Ch. Div. V. C. B.—Liquidation—Joint and Separate Estate—Vendors and Purchasers Act, 1874 (37 & 38 Vic. c. 78), s. 9.**—Joint creditors of two partners resolved on liquidation, and appointed A. and B. trustees; separate creditors of each partner also appointed A. and B. trustees of the separate property; B. resigned, and the joint creditors appointed A. sole trustee in the liquidation: *Held* that the legal estate in the separate property was vested in A., so that he could make a good title thereto to a purchaser.—*Ex parte Waddell*, 45 L.J. Ch. 647; 84 L.T. 287.
- (xxv.) **C. J. B.—Liquidation—Judgment Creditor.**—A judgment creditor delivered a writ of *fi. fa.* to the sheriff before debtor filed a liquidation petition: the creditors, including the judgment creditor, accepted a composition: after registration of the resolutions the sheriff seized under the writ: *Held* that the writ could not be enforced.—*Ex parte Balbirnie, Re Balbirnie*, 84 L.T. 857.
- (xxvi.) **C. A.—Liquidation—Registration of resolutions.**—*Held* that after passing of a special resolution for liquidation the registrar has no power to enquire into accuracy of debtor's statement of his affairs; if fraud is alleged a distinct application must be made to vacate registration.—*Ex parte Walter, Re Webb*, L.R. 2, Ch. D. 326; 45 L.J. Bpoy. 105; 84 L.T. 701; 24 W.R. 884.
- (xxvii.) **C. J. B.—Liquidation—Registration of resolutions.**—Creditors of debtor who had filed liquidation petition passed resolutions in form for liquidation, but in substance for Composition: a creditor not included in debtor's statement, and without notice of proceedings, commenced action against debtor for value of goods delivered by him to debtor for sale on commission: *Held* that the resolutions ought not to have been registered, and that the action could not be restrained.—*Ex parte Harold, In re Meade*, L.R. 3, Ch. D. 119; 45 L.J. Bpoy. 121; 84 L.T. 668.
- (xxviii.) **C. J. B.—Liquidation—Trustee.**—Where in liquidation trustee had undertaken, on appointment, to make good to Estate what should be found due from the late trustee: *Held* that on default the Court had no jurisdiction to order his committal under Debtors Act 1869.—*Ex parte Cudtifford, Re Hincks*, 45 L.J. Bpoy. 127; 84 L.T. 666; 24 W.R. 931.

- (xxix.) **C. J. B.—Liquidation—Trustee.**—Undischarged liquidating debtor engaged in trade and goods were sent to him by mistake, in belief that they were for a firm whose name resembled that of debtor. *Held* that trustee must return the goods to the vendor.—*Ex parte Barnett, Re Reade*, L.R. 3 Ch. D. 123; 45 L.J. Bpoy. 120.
- (xxx.) **C. A.—Liquidation—Trustee—Disclaimer.**—Trustee in liquidation received notice to disclaim lease within 28 days; on the day before the expiration of the 28 days he received letter from lessor asking for reply to previous notice "at his earliest convenience." *Held* that lessor had waived his right to insist on disclaimer within the 28 days and granted to the trustee an extension of time.—*Ex parte Moore, Re Stokoe*, L.R. 2 Ch. D. 802; 24 W.R. 720.
- (xxxi.) **C. J. B.—Liquidation—Trustee—Disclaimer.**—Trustees after notice to decide as to disclaimer, continued debtor's contracts for two years and then refused to continue them further. *Held* that persons aggrieved must prove for damages in the liquidation, and might be restrained by injunction from bringing actions against the trustees.—*Ex parte Davis and Sons, Re Sneezum*, 34 L.T. 805.
- (xxxii.) **C. A.—Prosecution.**—An application for prosecution of a fraudulent debtor under Debtor's Act, 1869, s. 16, should be made *ex parte*, and the debtor has no right to be present or to appeal.—*Ex parte Marsden, In re Marsden*, L.R. 2 Ch. D. 786; 34 L.T. 700; 24 W.R. 714.
- (xxxiii.) **C. A.—Prosecution.**—An order was made for prosecution of a debtor and also of a third party as accomplice. *Held* that such accomplice was not "aggrieved" within Bankruptcy Act, 1869, and had no right to appeal.—*Ex parte Brown, Re Appleby*, L.R. 2 Ch. D. 799; 45 L.J. Bpoy. 115; 35 L.T. 10; 24 W.R. 750.
- (xxxiv.) **C. A.—Trustee—Disclaimer.**—There is no appeal from order granting leave to disclaim after disclaimer, a person opposing the disclaimer should apply at once for stay of proceedings pending his appeal.—*Ex parte Ditton, Re Woods*, 24 W.R. 1008.
- (xxxv.) **C. J. B.—Trustee—Release.**—The release of a trustee does not operate till all his duties have been performed, and the court has jurisdiction to compel the performance of such duties.—*Ex parte Societè Cockrill, Re Proger*. L.R. 3; Ch.D. 116; 45 L.J. Bpoy. 124; 34 L.T. 660.
- (xxxvi.) **C. J. B.—Trustee—Removal.**—Creditors of bankrupt removed a trustee but voted him remuneration. *Held* that the court had power to disallow the remuneration.—*Ex parte Simmons, Re Lister*.—L.R. 2 Ch.D. 749; 45 L.J. Bpoy. 113; 34 L.T. 744.
- xxxvii.) **C. J. B. Voluntary Settlement.**—A non-trader in 1858, being then solvent, settled property on his wife and children; in 1873 he engaged in trade, and in 1875 became bankrupt. *Held* that the settlement was void under 13 Eliz. c. 5.—*Ex parte Stephens, Re Pearson*, 35 L.T. 68.

Bill of Exchange:—

- (i.) **C. A.—Acceptance on behalf of Company.**—A bill drawn on a Company was accepted by C. and M. as directors of the Company; directors were authorised to accept bills. *Held* that the acceptance complied with requirements of Companies' Act, 1862, s. 47, and bound the Company.—*Okell v. Charles*, 34 L.T. 822.
- (ii.) **Ex. Div.—Principal and Agent.**—A bill directed to C., General Agent of the U. Company, was accepted by him "on behalf of the Company." *Held* that C. was personally liable.—*Herald v. Connah*, 34 L.T. 885.

Bill of Sale:—

- (i.) **C. P. Div.—Growing Crops.**—A document of transfer of goods drawn up as evidence of a previous parol agreement is within the Bill of Sale Act, but

growing crops are not personal chattels within the Act.—*Branton v. Griffiths*, L.R. 1, C.P.D. 849; 45 L.J. C.P. 588; 84 L.T. 871; 24 W.R. 762.

- (ii.) **Ex. Div.—Registration—Possession.**—P. gave to plaintiff a bill of sale on furniture, attested by two witnesses: in the affidavit the description of one of the witnesses was omitted; P. resided on plaintiff's premises as manager of the business, and as part of his wages continued to use the furniture: *Held* that the affidavit was insufficient, and that the goods were in apparent possession of P., so that plaintiff could not claim them against execution creditor.—*Pickard v. Marriage*, L.R. 1, Ex. D. 364; 45 L.J. Ex. 594; 24 W.R. 886
- (iii.) **Ex. Div.—Trespass.**—Plaintiff gave bill of sale to defendant, and all his property "now or hereafter upon his premises at H., or elsewhere," with power on default to enter upon plaintiff's premises where any of his goods were deposited, and to seize and sell the same: defendant seized and sold two horses of plaintiff which he used for carrying the mail, and which were in the stable yard of an inn: *Held* that plaintiff was entitled to recover the value of the horses, but not to special damage for their loss.—*Greenbirt v. Smea*, 85 L.T. 168.

Bombay Civil Service Fund:—

- (i.) **H. L.**—The Bombay Civil Service Fund was vested in managers called "Trustees of the Fund," for the purpose of granting annuities to members, their widows, and children: F. was a member of the fund under its original constitution, and never accepted certain new regulations, whereby, on terms, additional benefits might be secured: after his death, in 1894, his widow claimed to have her income made up to £500, and also the additional benefits, offering to perform the conditions; her claim was refused, and she died in 1868: in 1867, her executor filed a bill: *Held* that under the circumstances the widow was entitled to have her income supplemented, but not to the additional benefits, that the claim was not barred by the Statute of Limitations, but that laches disentitled the executors from claiming interest.—*Edwards v. Warder*, L.R. 1, App. 281; 84 L.T. 174.

Canada, Law of:—

- (i.) **P. C.**—*Libel—Notice.*—A creditor as indorsee of debtor's promissory notes served notice on him under Canadian Insolvent Act, 1869, and caused him to be arrested, whereon debtor brought action for libel and malicious arrest; creditor pleaded truth of libel and reasonable cause for arrest: *Held* that the creditor was not bound to have recourse to his indorsers, and that the pleas did deny the falsity, and thereby rendered unnecessary the denial of the malice.—*Bank of British N. America v. Strong*, L.R. 1 App. 807; 84 L.T. 627.
- (ii.) **P. C.**—*Street—Expropriation.*—The corporation of Montreal closed one end of a street whereby plaintiff's tenants had to go further round to reach the southern part of the City. *Held* that he was not entitled to compensation for "expropriation" under the Municipal Acts of Montreal, nor to a previous indemnity under Art. 407 of the Civil Code of Canada.—*Mayor, etc., of Montreal v. Drummond*, L.R. 1, App. 884; 85 L.T. 106.

Company:—

- (i.) **Ch. Div. V. O. M.**—*Articles—Memorandum—Inconsistency.*—Where there is an inconsistency between the memorandum and articles of association of a company, the memorandum must prevail.—*Re Wedgewood Coal and Iron Co.*, *Anderson's case*, 84 L.T. 943.
- (ii.) **C. A.**—*Concealment—Fraud.*—S. agreed that if a company should be formed to purchase his property, he would pay to W. & H. £1500 besides their expenses from the Company; the company was formed but proved abortive; the agreement was never disclosed. *Held* that such conceal-

ment constituted a fraud which disentitled W. & H. from claiming remuneration for services rendered after formation of company.—*Re Hereford and S. Wales Waggon, etc., Co.*, L.R. 2 Ch. D. 621; 45 L.J. Ch. 35; L.T. 40; 24 W.R. 953.

- (iii.) Ch. Div. V. C. B.—*Misrepresentation*.—A shareholder brought action against a company and its directors for issuing a fraudulent prospectus; the company was then in voluntary liquidation and insolvent. *Held* that the action was properly framed and could not be restrained by injunction. *Hall v. Old Talargoch Mining Co.*, 34 L.T. 901.
- (iv.) C. A.—*Misrepresentation*.—A shareholder filed a bill to set aside his contract to take shares on the ground of deception and misrepresentation. *Held* that having acted as a shareholder for some months after he became aware of the circumstances he was not entitled to relief.—*Sharpley v. Louth and East Coast Railway Co.*, L.R. 2 Ch. 668; 85 L.T. 71.
- (v.) Ch. Div. V. C. B.—*Misrepresentation*.—In March P. sent out a circular letter inviting applications for shares in a company to be formed to purchase and work a colliery; he therein stated "you are not committed to take shares:" in May P. purchased the colliery and soon afterwards resold it at a profit to trustees for the company; in June the prospectus was issued, embodying statements of the circular letter; C. thereupon took shares in the company. *Held* that the purchase of the colliery by P. was not a contract required to be mentioned in the prospectus under Companies' Act, 1867, s. 88, *Craig v. Phillips*, 85 L.T. 198.
- (vi.) Ch. Div. V. C. B.—*Receiver*.—An unpaid vendor of the property of an insolvent company in voluntary liquidation, was appointed receiver without security or salary.—*Boyle v. Bettws Llantwit Colliery Company*, L.R. 2, Ch. D. 736.
- (vii.) Ch. Div. V. C. H.—*Stock jobber*.—*Held* that stock jobbers who had accepted an infant as transferee of shares in a company were liable to indemnify vendor against calls, notwithstanding agreement by liquidator with vendor releasing him from calls on condition that liquidator should have benefit of the suit.—*Heritage v. Paine*, L.R. 2, Ch. D. 594; L.J. 45, Ch. 295; 34 L.T. 947.
- (viii.) Ch. Div. V. C. B.—*Vendor's Guarantee*.—A vendor of railway tyre and steam roller works to a Company guaranteed dividends at the rate of £10 per cent. for two years; part of the purchase money was in vendor's shares, which it was agreed should be sold if vendor should fail to meet his guarantee. The works being unprofitable the directors abandoned the railway tyre department, and the remainder of the works not yielding any profit they claimed payment of £10 per cent. under the guarantee: *Held* that the discontinuance of the tyre works absolved the vendor from his guarantee, and that he was entitled to restrain the company, by injunction, from selling the vendor's shares.—*Brown & Co. v. Brown*, 85 L.T. 54.
- ix.) Ch. Div. V. C. B.—*Winding-up—Contributory*.—A foreign shareholder in an English company, who liquidates before winding-up of company and obtains his discharge, will be liable to contribute if his liability for calls at the date of his liquidation could not be estimated for purposes of proof.—*Re East Indian Cotton Agency, Furdoonjee's Case*, 35 L.T. 53.
- (x.) C. A.—*Winding-up—Debentures*.—Directors being empowered by Articles of Association to borrow on debentures, or any other security whatsoever, at such rate of interest and on such terms as they should think fit, created 100 debentures of £250 bearing £6 per cent. interest, of which 60 were issued at £95 and the remainder were issued without consideration to trustees for the Company; subsequently, directors borrowed £8,000 from a financial Society, at £10 per cent. interest, on acceptances of the Company, and the 40 debentures were transferred to the Society as additional security: *Held* that on winding-up of the Company the Society

were entitled to prove rateably with the holders of the 60 debentures for the sum of £8,000 with interest.—*Re Regent's Canal Ironworks Co.*, 45 L.J. Ch. 680; 85 L.T. 288; 24 W.R. 687.

- (xi.) **O. A.**—*Winding-up—Debentures—Registration.*—Directors advanced money to Company on mortgage debentures charging the undertakings and all moneys arising therefrom; the entry in the register of mortgages omitted description of the property charged: *Held* that the debentures were invalid under Companies' Act, 1862, s. 49, and that the holders had no priority over general creditors.—*Re Native Iron Ore Co. Ex parte Elphinstone*, 45 L.J.Ch. 617; 84 L.T. 777; 24 W.R. 503.
- (xii.) **O. A.**—*Winding-up—Illegal Association.*—An unregistered Company of more than 20 members made over its assets and business to a limited Company, which proved unsuccessful, and passed a resolution for winding up: *Held* that the solicitors of the unregistered Company could not prove for costs incurred in relation to the formation of or defending actions brought against such Company, being an illegal Association.—*Re South Wales Atlantic Steamship Co.* L.R. 2 Ch.D. 763.; 85 L.T. 294.
- (xiii.) **Ch. Div. M. R.**—*Winding-up—Jurisdiction.*—The Court in England in which the winding-up of a Company is proceeding can restrain an action in Ireland by a creditor of the Company. *Re International Patent Pulp and Paper Co.* 45 L.J. Ch. 446; 85 L.T. 229; 24 W.R. 535.
- (xiv.) **Ch. Div. M. R.**—*Winding-up—Liquidators.*—The survivor of two liquidators appointed on the voluntary winding-up of a Co. has no power to affix the seal of the Co. to a conveyance of the bare legal estate to property vested in the Co.—*Re Metropolitan Bank and Jones*, L.R. 2, Ch. D. 366; 45 L.J.Ch. 525; 24 W.R. 815.
- (xv.) **Ch. Div. V. C. H.** *Winding-up—Registration—Infant Subscriber.*—One of the seven subscribers to memorandum of association was an infant who attained majority about 4 months afterwards and 16 months before a compulsory order to wind up the Company was made; he took no steps to remove his name till six months after the order: *Held* that the registration was valid, the Company duly incorporated, and the winding up order good.—*In Re Nassau Phosphate Co.*, L.R. 2, Ch.D. 610; 45 L.J.Ch. 584; 24 W.R. 692.

Copyhold:—

- (i.) **C. P. Div.**—*Enfranchisement.*—Copyholder, having given notice of enfranchisement, died after the award had been forwarded to the Commissioners, but before confirmation: *Held* that his devisee must be admitted and pay the fine before claiming enfranchisement of the land.—*Myers v. Hodgson*, L.R. 1, C.P.D. 609; 45 L.J. C.P. 603; 84 L.T. 881; 24 W.R. 827.
- (ii.) **Ch. Div. M. R.**—*Minerals—Trespass.*—Where a lord of a manor, having the customary right to bring to the surface through and upon a copyholder's land minerals got within the manor, brought through and upon such land minerals got outside the manor: *Held*, that the act was trespass, and injunction granted, but damages refused.—*Eardley v. Earl Granville*, 45 L.J. Ch. 669; 84 L.T. 609; 24 W.R. 528.

Coroner.—

- (i.) **Q. B. Div.**—*Imperfect Verdict.*—Where coroner rejected material evidence so that jury gave an imperfect verdict, and new material evidence was forthcoming, the Court quashed the inquisition and ordered coroner to hold an inquiry with a fresh jury—*super visum corporis.*—*Regina v. Carter*, 45 L.J. Q.B. 711; 84 L.T. 849; 24 W.R. 882.

County Court:—

- (i.) **App. Div. Ct.**—*Appeal—Fact.*—The County Court Act, 1875, s. 6, gives no right of appeal on a question of fact.—*Cousens v. London Deposit Bank*, 45 L.J. C.P. 573.

- (ii.) **P. D. & A. Div.—Appeal—Salvage.**—Where a tender of less than £50 is upheld in a salvage case, no appeal lies.—*The Fyenoord*, 84 L.T. 918.

Crimes and Offences :—

- (i.) **App. Div. Ct.—Arrest.**—A person against whom a warrant has been issued for an offence less than felony, cannot be arrested by a constable who has not the warrant in his possession at the time of arrest.—*Codd v. Cobe*, L.R. 1, Ex. D. 852; 45 L.J. M.C. 101.
- (ii.) **App. Div. Ct.—Baker—Scales and Weights.**—A baker was in the habit of delivering bread to a regular customer from his cart, not carrying with him scales or weights. *Held* that he was rightly convicted under 6 & 7 Wm. iv., c. 87, s. 7.—*Robinson v. Cliff*, L.R. 1, Ex. D. 294; 45 L.J. M.C. 109; 84 L.T. 689.
- (iii.) **O. C. R.—Bigamy.**—On an indictment for bigamy, it was proved that the first marriage was solemnized in a building where Divine Service was performed during repair of the parish church: *Held* that the building must be presumed to have been licensed: conviction affirmed. *Regina v. Cresswell*, L.R. 1, Q.B.D. 446; 45 L.J. M.C. 77; 38 L. 760; 24 W.R. 281.
- (iv.) **Q. B. Div.—Conspiracy.**—Defendants were indicted for conspiring as promoters of a Company to induce the Stock Exchange Committee to order quotation of its Shares, and thereby to induce and persuade divers of the liege subjects of our Lady the Queen who should thereafter try to sell the shares of the said Company, to believe that the said Company was duly formed and constituted, and had in all respects complied with the rules and regulations of the Stock Exchange, so as to entitle the said Company to have their shares quoted in the official list of the said Stock Exchange: *Held* a sufficient indictment.—*Regina v. Aspinall*, 44 L.J. M.C. 129; 24 W.R. 921.
- v.) **C. C. R.—Deaf-Mute.**—A deaf-mute was convicted of larceny, but the jury found that the prisoner was not capable of understanding the proceedings. *Held* that the conviction could not be sustained, but that he must be detained as non-sane during the Queen's pleasure.—*Regina v. Berry*, L.R. 1 Q.B.D. 447; 45 L.J.M.C. 128.
- (vi.) **App. Div. Ct.—Gaming.**—Service of information and summons is necessary to render valid, under 8 and 9 Vict., c. 109, a conviction for permitting gaming and wagering.—*Blake v. Beach*, L.R. 1 Ex.D. 320; 45 L.J.M.C. 111; 84 L.T. 764.

Debtor and Creditor :—

- (i.) **C. A.—Fraudulent Assignment.**—T. with knowledge of defendant delivered to A. goods in fraud of his creditors; A. without knowledge of T., and not in furtherance of the fraud, sold the goods to defendant. *Held* that Pltff. was entitled to recover the goods.—*Taylor v. Bowers*. 84 L.T. 938.
- (ii.) **Infant—Ratification.**—A promise on attaining majority to pay a debt, contracted in infancy, "as a debt of honour" is not a ratification of the contract within 9 Geo. IV., c. 14, s. 5.—*Maccord v. Osborne*, L.R. 1 C.P.D. 569; 45 L.J.C.P. 727; 85 L.T. 164.
- (iii.) **C. A. Infant—Set-off.**—Under 2 Geo. II. c. 22 s. 18 and 9 Geo. IV. c. 14, s. 5, set-off cannot be maintained of a debt contracted in infancy and not ratified on attaining full age.—*Rawley v. Rawley*, L.R. 1 Q.B. D. 460; 45 L.J. Q.B. 675; 85 L.T. 191; 24 W.R. 995.
- (iv.) **App. Div. Ct.—Sheriff—Writ of fi. fa.**—When goods have been seized under fi. fa., and the execution creditor afterwards becomes disentitled to recover the judgment debt, the sheriff cannot, without instructions from the execution creditor, sell any of the goods to realize his possession money, fees, and expenses.—*Sweeney v. Abdy*, L.R. 1 Ex. D. 399; 34 L.T. 901.

- (v.) **Ch. Div. V. O. H.**—*Statute of Limitations*.—Within 6 years after debt incurred plaintiff took out writ in Common Pleas; within 6 months afterwards he took out administration summons in respect of some debt: *Held* that the debt was barred in Chancery.—*Fivet v. Manby*. *In re Manby*, L.R. 3 Ch. D. 101; 35 L.T. 307; 24 W.R. 699.

Defamation:—

- (i.) **Q. B. D.**—*Libel—Costs*.—Where, on information for libel, under 6 & 7 Vict. c. 96, judgement is given for defendant, he is entitled to costs incurred previously to filing of information.—*Regina v. Steel*, L.R. 1 Q.B.D. 482; 45 L.J. Q.B. 391.
- (ii.) **C. P. Div.**—*Standard—Privilege*.—An expert witness, being asked in cross-examination as to comments of the judge on evidence given by him in a former trial, voluntarily gave an explanation or defence in defamatory language: *Held* that the language was used in the character of a witness, and was privileged.—*Seaman v. Netherclift*, L.R. 1 C.P.D. 540; 34 L.T. 878; 24 W.R. 884.

Domicil:—

- (i.) **Ch. Div. M. B.**—*Held* that acquisition of domicil of choice involves residence in a new country with intention to continue there permanently, and that where there was a clear intention to abandon such domicil of choice the choice of the domicil of origin revived.—*King v. Foxwell*, 45 L.J.Ch. 693; 24 W.R. 680.

Eccelesiastical Law:—

- (i.) **P. C.**—*Church Ornaments*.—In cause by vicar against churchwarden for having removed a wooden cross placed on the re-table by the vicar's authority. *Held* that the cross was not a lawful church ornament, but neither party having acted under a faculty the suit was dismissed without costs.—*Durst v. Masters*, L.R. 1 P.D. 373; 35 L.T. 37; 24 W.R. 1019.
- (ii.) **London Consistory Ct.**—*Churchyard—Faculty*.—The court granted a faculty for appropriation of a churchyard, closed for burials under Order in Council, for purpose of a public garden, and authorized construction of footpaths and erection of gates.—*Re St. George's-in-the-East*, L.R. 1 P.D. 811.
- (iii.) **C. A.**—*Dilapidations*.—Two incumbents after the passing of the Ecclesiastical Dilapidations Act, 1871, agreed to exchange benefices on terms that no payments should be made by either to the other in respect of dilapidation: *Held* that the agreement was not illegal under the statute nor (semble) Simoniacal.—*Wright v. Davies*, 33 L.T. 188; 24 W.R. 841.
- (iv.) **Ar.**—*Holy Communion—Crucifix*.—*Held* that incumbent who repeatedly administered the Holy Communion to less than three persons must be admonished to obey the rubric; also that a metal crucifix surmounting a screen at entrance of chancel must be removed as unlawful.—*Clifton v. Ridsdale*, L.R. 1 P.D. 316.
- (v.) **P. C.**—*Inhibition*.—37 & 38 Vict. c. 85 s. 9. The Public Worship Regulation Act, 1874, does not deprive the judge of his discretionary power to issue inhibition pending appeal.—*Ridsdale v. Clifton*, 45 L.J. P.C. 12; 34 L.T. 515; 24 W.R. 1021.

Election:—

- (i.) **C. P. Div.**—*Municipal Election*.—The description of a candidate by initials, instead of Christian name in full, is fatal to validity of a nomination paper.—*Mather v. Brown*, L.R. 1, C.P.D. 596; 45 L.J. C.P. 547 34 L.T. 869; 24 W.R. 786.
- (ii.) **C. P. Div.**—*Municipal Election*.—The delivery of a nomination paper to the town clerk by an agent is bad under Municipal Elections Act, 1875 (38 & 39 Vic. c. 40) s. 1, sub. sec. 8.—*Monks v. Jackson*, 35 L.T. 95.

- (iii.) **C. P. Div.**—*Municipal Election*.—Notice of the day on which nomination papers are to be delivered, must be given seven clear days previously, exclusive of nomination day, day of election, and Sundays.—*Howes v. Turner*, 45 L.J. C.P. 550; 85 L.T. 58.
- (iv.) **C. C. R.**—*Municipal Election—Voting Papers*.—At a Municipal Election the County Court has power to order production of the counted and rejected voting papers and marked counterfoils, as evidence of an offence against the Ballot Act.—*Regina v. Beardsall*, L.R. 1, Q.B.D. 452; 84 L.T. 660
- (v.) **C. P. Div.**—*Parliamentary Election*.—The Court will not allow the amendment of a petition by an unsuccessful candidate by striking out the claim for the Seat.—*Aldridge v. Hurst*, L.R. 1, C.P.D. 410; 45 L.J. 431; 85 L.T. 156; 24 W.R. 708.
- (vi.) **App. Div. Ct.**—*Parliamentary Election—Revising Barrister*.—A revising barrister ordered removal of plaintiff from Court, on the ground that in the previous year he had wrongfully withheld certain documents: to County Court action for wrongful expulsion, the barrister relied as special defence on provisions of 28 Vic. s. 16, and plaintiff was non-suited on the ground that the decision of the barrister on the question of "interruption" could not be reviewed by another Court: *Held* that the non-suit was wrong.—*Willis v. Machlachlan*, L.R. 1, Ex. D. 876; 45 L.J. C.P. 689; 85 L.T. 218.

Enclosure Act:—

- (i.) **C. A.**—*Gravel pit—Lateral extension*.—*Held*, on the construction of an Inclosure Act passed in 1764, wherein it was enacted that the surveyors of the parish of B. might cut and dig gravel from existing pits for repair of highways, that the surveyors were entitled to extend the pits laterally though the surface was thereby destroyed.—*Ellis v. Local Board of Bromley*, 33 L.T. 182; 24 W.R. 716.

Endowed School:—

- (i.) **P. C.**—The mastership of Alleyn's College, Dulwich, being an office created and defined by 20 and 21 Vic., c. 84, gives the holder a vested interest in the office and emoluments thereof, within Endowed Schools Act, 1869, s. 13.—*Re Alleyn's College at Dulwich*, L.R. 1 App. 69; 45 L.J. P.C. 28.

Evidence:—

- (i.) **Ex. Div.**—*Descent*.—Where death of a person is of very remote date, if it is shown that no trace of his descendants can be found, it will be presumed that he died without issue.—*Greaves v. Greenwood*, 85 L.T. 65; 24 W.R. 926.
- (ii.) **C. A.**—*Publication*.—The publication of depositions taken in a suit to perpetuate testimony was opposed on the ground that the suit was collusive, and that the plaintiff in the present suit was not a party thereto: *Held* that the evidence must be published, and that time for taking evidence in the cause must be extended to enable either party to produce fresh evidence after having seen the depositions.—*Fane v. Fane*, 45 L.J.Ch. 589; 24 W.R. 565.

Fishing:—

- (i.) **C. P. Div.**—A custom for the dwellers of a manor and parish to have common of fishery over the lord's waters, and to take away fish as profit & prendre is unreasonable and bad.—*Allgood v. Gibson*, 84 L.T. 888.

Foreign Loan:—

- (i.) **H. L.**—*Scrip*.—Scrip issued by a Foreign Government through agents in England, entitling the bearer to a bond on payment of all instalments, is a negotiable instrument.—*Goodwin v. Roberts*, 45 L.J. Ex. 748; 85 L.T. 179; 24 W.R. 987.

Forest of Dean :—

- (i.) **Ch. Div. V. O. M.**—*Grant of Gale*.—In 1844 A., a free-miner, applied for grant of a vacant gale; in 1846 B. & C. applied for the same gale: in 1856 the gale was granted to A: in 1868, the gale being vacant, D. applied for it, but died before his grant, having devised his gale to X. and Y., not free-miners: *Held* that D.'s application gave him an equitable and transmissible right to the gale, and that X. & Y. were entitled to a grant thereof.—*Davis v. Adams*, 24 W.R. 944.
- (ii.) **Statutory Duty**—1 & 2 Vic. c. 43, s. 29.—This Act, and the Rules under it regulate mines in the Forest of Dean: s. 29 provides that the statutory duties may be enforced by injunction: *Held* that an action was, nevertheless, maintainable for injury sustained by breach of the rules.—*Ross v. Rugge Price*, L.R. 1, Ex. D. 269; 84 L.T. 535; 24 W.R. 786.

Friendly Society :—

- (i.) **Q. B. Div.**—*Action against Secretary*.—An action against a Friendly Society was compromised, the Society undertaking to pay to plaintiff certain costs and charges, which, not being paid, plaintiff sued the Secretary: *Held* that this was a proceeding touching the right of the Society under 18 & 19 Vic. c. 68, s. 19, and was properly brought against the Secretary under 21 & 22 Vic. c. 101, s. 7.—*Roberts v. Page*, L.R. 1, Q.B.D. 476; 45 L.J. Q.B. 601.

Highway :—

- (i.) **App. Div. Ct.**—*Construction of Statute*.—Although the word "rider" is not mentioned in the penal clause of the Highway Act, 1835 (5 & 6 Wm. iv. c. 50), s. 78, the justices have jurisdiction to convict thereunder for furiously riding on horseback.—*Williams v. Evans*, L.R. 1, Ex. D. 277.
- (ii.) **Q. B. Div.**—*Repair—Landslip*.—A portion of a road was carried away by a landslip: *Held*, upon the facts, and the surveyor's report, that there was no such destruction as to free the parish from liability to repair.—*Regina v. Greenhow, Inhabitants of*, 45 L.J. M.C. 141.
- (iii.) **Q. B. Div.**—*Sale of parish land—pre-emption*.—On sale under 5 & 6 Wm. IV. c. 50, s. 48, of land allotted to the parish for repair of highways, the price is to be fixed with regard to the interests of the adjoining landowner in whom the right of pre-emption lies.—*Regina v. Drayton Highway Board (Mainwaring and others)*, L.R. 1 Q.B.D. 608; 45 L.J. M.C. 126; 85 L.T. 251; 24 W.R. 756.
- (iv.) **Q. B. Div.**—*Sale of Toll-house—Discretion*.—A wide discretion must be allowed to turnpike trustees in deciding whether the site of a disused toll-house shall be sold, or added to the road.—*Regina v. Fox*, 85 L.T. 249.

Husband and Wife :—

- (i.) **Ch. Div. M. R.**—*Acknowledgments*.—Commissioners for taking acknowledgments of married women under Fines and Recoveries Act s. 81, may act for any county.—*Blackmur v. Blackmur*, 45 L.J. Ch. 710; 24 W.R. 900.
- (ii.) **Ch. Div. M. R.**—*Acknowledgments*.—When order under 3 & 4 Wm. IV. c. 74, s. 91, has been obtained, a deed disposing of the property therein referred to does not require acknowledgment.—*Goodchild v. Dougal*, 24 W.R. 960.
- (iii.) **P. D. & A. Div.**—*Divorce—Jurisdiction*.—Persons, both being domiciled in Jersey, were there married; the husband having there committed adultery and deserted his wife, she came to and lived in England.—*Held* that the Court had no jurisdiction to grant divorce.—*Le Sueur v. Le Sueur*, L.R. 1, P.D. 189; 45 L.J. P.D. A. 78; 84 L.T. 511; 24 W.R. 616.
- (iv.) **Ch. Div. V. C. B.**—*Necessaries*.—Where a husband turned his wife adrift without means, she must be presumed to have authority to pledge

her husband's credit for necessities, including medical attendance.—*Foristall v. Lawson*, 84 L.T. 903.

- (v.) **P. D. & A. Div.**—*Restitution of conjugal rights*.—Neither mere impropriety of conduct nor previous refusal to permit conjugal intercourse are grounds for refusing to a wife a decree for restitution of conjugal rights.—*Rippin-gall v. Rippingall and Delacour*, 24 W.R. 967.

Indian Appeals :—

- (f.) **P. C.**—*Cession of British Territory*.—The transfer of British Territory from ordinary British jurisdiction to the supervision of a political agency requires a Legislative Act. Such transfer would not amount to a cession of territory to a foreign State, nor deprive the crown or British subjects of their respective rights in the territory transferred. *Quare* whether concurrence of the Imperial Parliament is necessary to a transfer.—*Damodhar Gordhan v. Deoram Kanji*, L.R. 1 App. 882.

Inn of Court :—

- (i.) **Ch. Div. V. C. H.**—*Jurisdiction*.—The Inns of Court are voluntary Societies, and the decisions of the benchers as to disbenchings or disbarring members are final, subject to appeal to the Lord Chancellor and Judges as visitors.—*Manisty v. Kensaly*, 24 W.R. 918.

Insurance :—

- (i.) **C. A.**—*Amalgamation*.—In pursuance of provisions of deeds of settlement the I. Insurance Company was dissolved, and its funds transferred to the E. Company, which covenanted to satisfy liabilities of I. Company. C. held policy in I. Company subject to conditions of deed of settlement; he had notice of intended amalgamation, but not of completion thereof, nor was his policy endorsed by E. Company; he paid premiums and took receipts in the name of E. Company. *Held* that the amalgamation was binding on policy holders, and that C. was bound by his conduct and had accepted the E. Company. *Hart's Case* (L.R. 1 Ch.D. 307; 45 L.J.Ch. 321; 33 L.T. 766) followed.—*Re European Assurance Society Arbitration Acts, Cocker's Case*, L.R. 3 Ch.D. 1; 35 L.T. 290.
- (ii.) **C. A.**—*Amalgamation*.—Deed of settlement of A. Insurance Company provided for making new laws and regulations, and by such new laws power was given to directors for amalgamation with any other Company; by a private Act of Parliament it was provided until enrolments in Chancery of transfers of shares, the transferors should continue liable, but should be re-imbursed for any loss out of the funds of the Company; with a view to amalgamation with B. Company, C. transferred shares to a trustee for B. Company, but the transfer was not enrolled. *Held* that C. was not liable as a contributory, and also that holders of policies granted before the new laws were, nevertheless, bound thereby. *Re European Assurance Society Arbitration Acts. Doman's Case*. L.R. 3 Ch.D. 21; 34 L.T. 929.
- (iii.) **C. A.**—*Amalgamation*.—A similar transfer of shares by D. was not enrolled till four years after transfer: *Held* that the subsequent transfer was sufficient, and that D. was not liable as a contributory. *Re European Assurance Society Arbitration Acts. Rivington's Case*, L.R. 3 Ch.D. 10; 34 L.T. 926.
- (iv.) **Ch. Div.**—*Fire Insurance—Wharfinger's Liability*.—B. & Co. effected with Plaintiff's Co. and Defendant's Co., respectively, insurances on all grain in their custody as wharfingers: R. & Co., merchants, deposited grain with B. & Co., and insured same with Plaintiff Co.; both policies were subject to conditions of average, and provided that in case of other subsisting policies the grantors should not be liable to pay more than the rateable proportion: *Held* that the grantors of the merchant's policies were not liable to contribute, the separate insurances being made on separate interests.—*North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.*, 45 L.J. Ch. 548; 85 L.T. 281.

- (v.) **Q. B. D.**—*Marine Insurance*.—A ship after arrival at M. lost an anchor on the 31st December, 1873: next day the captain protested the loss before a notary, but, on the 9th January, 1874, he wrote without mentioning loss to the owner, who, on 11th February, 1874, effected a policy on the ship and freight "at and from M. to a port in U. K.:" *Held*, that the policy was not avoided by non-communication of the loss.—*Stribley v. Imperial Marine Insurance Co.*, L.R. 1, Q.B.D. 507; 45 L.J. Q.B. 396; 24 W.R. 701.
- (vi.) **C. P. D.**—*Marine Insurance*.—The judgment of a Foreign Tribunal is generally (but not if admittedly erroneous) binding on an English Court: only expenses necessary to avert total loss can be recovered under the suing and labouring clause of a policy, free from particular average: the sale of goods assured, by order of a Foreign Tribunal, does not amount to constructive total loss, where such sale is made merely to repay advances incurred through captain's default in not transshipping the goods:—*Meyer v. Ralli*, L.R. 1, C.P.D. 358; 45 L.J. C.P. 741; 24 W.R. 963.
- (vii.) **Ch. Div. M. R.**—*Marine Insurance*.—Members of an unregistered Mutual Insurance Association might effect "special rate policies:" applicants, who were not members, took out a special rate policy signed by procuration by the managers who gave and accepted a bill of exchange for the amount assured: the managers failed, and their acceptances were dishonoured: *Held* that applicants were not entitled to repayment by the Association of the amount of the premiums.—*Re Arthur Average Association. De Winton & Co.'s Case*, 34 L.T. 942.
- (viii.) **H. L.**—*Marine Insurance*.—A steamship lying in the V. docks was insured against fire for 3 months, with liberty of removal to a dry dock; after repairs in the dry dock, while moored in the Thames for the purpose of replacing her paddle wheels, which had been as is usual removed on going into the dry dock, she was consumed by fire. *Held* that the insurers were not liable.—*Pearson v. Commercial Union Assurance Co.*, 24 W.R. 951.
- (ix.) **Ex. Div.**—*Marine Insurance*.—Plaintiff, a shipowner, employed brokers to effect insurances, who employed defendant, also a broker, as sub-agent without notice to plaintiff. The shipowner had monthly accounts with his brokers, which he duly settled, but they did not repay the defendant the amount paid by him for premiums. The policies remained in custody of defendant who knew that his employers were acting on behalf of plaintiff. *Held* that defendant had no lien on the policies.—*Fisher v. Smith*, 34 L.T. 912.
- (x.) **Ex. Ch.**—*Mutual Insurance Society*.—*Held* upon the construction of rules of the society providing for submission of disputes and avoidance of litigation, and having regard to the form of the policy under which the plaintiff claimed and to the facts of the case, that the society were stopped from disputing the plaintiff's interest in the policy and his right as a member to claim under it.—*Edwards v. Aberayron Mutual Ship Insurance Society*, L.R. 1 Q.B.D. 568; 34 L.T. 467.

Justice of the Peace:—

- (i.) **C. A.**—*Clerk to Borough Justices—Clerk of the Peace*—24 & 25 Vict., c. 75, s. 5.—F., a solicitor, was appointed in 1845 clerk to the justices of a borough in the county of M., and upon the passing of the Municipal Corporations Act Amendment Act, 1861, he was re-appointed to that office; in 1874 he was appointed clerk of the peace to the said county, the duties of which office he had for many years performed as deputy to his partner; subsequently, in November, 1874, he was re-appointed by defendant and other justices clerk to the justices of the borough. *Held* in an action to recover a penalty of £100 against defendant under s. 5, that defendant was not liable, as the appointment or re-appointment of F. as justices' clerk in November, 1874, was lawful by reason of his having been justices' clerk previous to 1861.—*Brown v. Evans*, 38 L.T. 737; 24 W.R. 937.

- (ii.) **App. Div. Ct.—Jurisdiction—Evidence.**—Appellant was summoned under Metropolitan Police Act (2 & 3 Vict. c. 47) for causing obstruction in a thoroughfare by a moveable show-board in front of his shop: the magistrates refused to hear witnesses to prove that they were not incommoded by the projection. *Held* that the magistrates had power to reject the evidence as irrelevant: conviction affirmed.—*Read v. Perrett*, L.R. 1 Ex. D. 849.

Landlord and Tenant:—

- (i.) **C. A.—Covenant—Arbitration.**—Tenant covenanted not to keep ground game to the injury of his landlord, and to pay compensation for any such injury, the amount to be referred to arbitration. *Held* that the covenants were collateral and distinct, and that an action was maintainable, though there had been no arbitration.—*Dawson v. Fitzgerald*, L.R. 1 Ex. D. 257; 85 L.T. 220; 24 W.R. 824.
- (ii.) **C. A.—Covenant—Public House.**—The lease of a Public House contained a covenant not to do or permit any act that could or might affect, lessen, or make void the license, and also a forfeiture clause; the lessee was convicted of offences against the Licensing Acts, 1873 and 1874, but the justices directed the convictions not to be recorded on the licenses. *Held* that the licenses were not "affected," and that no breach of covenant took place.—*Wooler v. Knett*, L.R. 1 Ex. D. 265; 85 L.T. 181; 24 W.R. 1004.
- (iii.) **C. A.—Covenant—Renewal.**—A lease was granted to F. and H. with lessee's covenants (amongst others) not to assign without license, and to keep premises in repair, with proviso for re-entry, on breach, and also with lessor's covenant for renewal on performance of lessee's covenants; H., without license, assigned his interest to F., and afterwards became bankrupt; the lessor accepted rent from F. alone; F., on termination of lease, required renewal to himself alone; at that time £18 at least was required properly to repair the premises. *Held* that the existing breach of covenant, though not substantial, disentitled F. to claim renewal, that one of the two lessees could not require renewal to himself alone, and that the waiver of right of re-entry did not amount to acknowledgment of right to renewal.—*Finch v. Underwood*, L.R. 2 Ch. D. 810; 45 L.J. 522; 84 L.T. 779; 24 W.R. 657.
- (iv.) **C. A.—Covenant—Repair—Forfeiture.**—A lease contained covenant to repair on 6 months' notice, with forfeiture clause; on 22nd October, 1874, plaintiff gave lessees, the defendants, notice to repair; defendants proposed purchase by plaintiff of their interest; after negotiations plaintiff, on 31st December, wrote that price demanded was too high and requesting a modification; after further negotiations plaintiff, on the 18th April, 1875, wrote that the notice would expire on the 21st; the repairs were then commenced but not finished till June. *Held* that plaintiff having misled defendants to believe notice was suspended was not entitled to insist on forfeiture.—*Hughes v. Metropolitan Rail. Co.*, L.R. 1 C. P. D. 120; 45 L.J. C. P. 578; 85 L.T. 87.
- (v.) **App. Div. Ct.—Covenant—Trade.**—It is no breach of covenant not to carry on business of a wholesale or retail confectioner for a grocer to sell sweetmeats.—*Lumley v. Metropolitan Rail. Co.*, 84 L.T. 774.
- (vi.) **C. P. Div.—Distress**—Lease contained covenant by lessee to consume hay, &c., on the premises; landlord distrained and sold the hay, subject to condition that purchaser should not remove it, and thereby did not obtain the best price. *Held* that condition was illegal. *Hawkins v. Walron*, L.R. 1 C. P. D. 280; 85 L.T. 210; 24 W.R. 824.
- (vii.) **Ch. Div. V.C.M.—Infant—Building Lease.**—The Court has power under 11 Geo. IV., and 1 Wm. IV. c. 65, to sanction building lease of infant's real estate, when he is entitled to reversion in fee after his

father's tenancy by the curtesy. *Re Letchford* L.R. 2 Ch.D. 719; 45 L.J.Ch 530.

- (viii.) **C. P. Div.—Lease—Discrepancy.**—Where there is a discrepancy between lease and counterpart the lease must prevail; where the statement as to duration of term in habendum differs from that in reddendum, the habendum must prevail.—*Burchell v. Clark*, L.R. 1 C.P.D. 602; 45 L.J.C.P. 671.

Lands Clauses Act:—

- (i.) **C. P. Div.—Compensation—Arbitration.**—A municipal corporation empowered by Local Act to supply water, gave notice to plaintiff to divert the whole of his mill stream; an agreement was entered into to submit the compensation for such diversion to arbitration; the corporation never required to divert more than part of the stream: *Held* that this was an arbitration under s. 9 of the Lands Clauses Consolidation Act, 1854, and that the agreement was valid and binding.—*Stone v Mayor etc., of Yeovil*, 45 L.J.C.P. 657; 84 L.T. 874; 24 W.R. 1073.
- (ii.) **C. A.—Compensation—Arbitration.**—An umpire in an arbitration under the Lands' Clauses Act has no power to make his award in the form of a special case.—*Rhodes v. Airedale Drainage Commrs.*, L.R. 1 C.P.D. 403; 35 L.T. 46; 24 W.R. 1058.
- (iii.) **Ex. Div.—Compensation—Land injuriously affected—Public Works.**—*Held* that plaintiff was not entitled to compensation for injury to his property, by certain public works carried out by defendants, acting under the St Marylebone Acts of Geo. III., and under the Metropolis Local Management Act, which incorporated the Lands Clauses Act, exclusive of ss. 16-68.—*Baker v. Vestry of St. Marylebone* 35 L.T. 129, 24 W.R. 848.
- (iv.) **C. A.—Compensation—Mortgages—Goodwill.**—P. mortgaged business premises with plant; a railway Co. gave notice to take part of the premises, but, before the price was fixed, the mortgagor died: mortgagees entered into possession, and the price was fixed by arbitration: *Held* that the mortgagees were entitled to the sum awarded in respect of goodwill and compensation for loss of profits.—*Pile v. Pile. Ex parte Lambton*, L.R. 3 Ch. D. 26; 35 L.T. 18; 24 W.R. 1003.
- (v.) **Ch. Div. V. C. B.—Costs.**—Where purchase-money of settled lands taken by a Local Board had been paid into Court and invested, and an order had been made for payment of the dividends to the trustees, or one of them; the Court refused after the death of each trustee to order the Local Board to pay the costs of an application by the new trustees of the settlement for payment to them of the dividends.—*Re Pryor's Settlement Trusts*, 35, L.T. 202.
- (vi.) **Ch. Div. M. R.—Investment.**—Where an extraordinary investment of funds in Court is asked for by tenant for life and refused, the costs of serving a trustee or remainder man with petition, will not be thrown on the Company.—*Re Dowling's Trusts*, 45 L.J. Ch. 568; 24 W.R. 729.

Leases and Sales of Settled Estates Acts:—

- Ch. Div. M. R.—Consent.**—The Amendment Act, 1874, s. 3, does not enable the Court to dispense with consent to an application under the principal Act without notice to persons whose consent is required thereby.—*Re Rylar*, 24 W.R. 949.
- (ii.) **Ch. Div. M. R.—Consent.**—Where an estate was subject to a life interest limited upon trust to sell and divide the proceeds, *Held* that the consent of the persons beneficially entitled thereto was necessary for an application for sale.—*Bailey v. Holmes*, 24 W.R. 1068.

Licensed House:—

- (i.) **C. A.—Held** that a room open to the street, without seats, where persons could obtain ginger beer and lemonade, was a place of public "resort, re-

freshment, and establishment," within 23 Vict., c. 27, s. 6, and that the keeper of such place was rightly convicted of keeping an unlicensed refreshment house.—*Howes v. Board of Inland Revenue*, L.R. 1, Ex. D. 385; 24 W.R. 897.

Lord Mayor's Court:—

- (i.) **C. A.—Prohibition.**—The Mayor's Court has, under the Mayor's Court Procedure Act, 1857, absolute jurisdiction over cases within s. 13 thereof, and the superior courts cannot issue prohibition.—*Hawes v. Pavey*, L.R. 1 C.P.D. 418; 34 L.T. 836; 24 W.R. 893.
- (ii.) **C. A.—Prohibition.**—Similar decision.—*Hawkins v. Jeffreys*, 34 L.T. 837.
- (iii.) **C. P. Div.—Removal of Judgment.**—Where a judgment is removed to a Superior Court for execution and it appears that the Mayor's Court had no jurisdiction, the Superior Court will set aside the judgment and issue prohibition.—*Bridge v. Branch*, 34 L.T. 905.

Lunacy:—

- (i.) **C. A.—Entail.**—A lunatic, aged 82, and without issue, was tenant in tail of an advowson and other property, a lease whereof had been made for 99 years if the lunatic should so long live; administrator of lessee petitioned Court to consent to barring the entail so far as necessary for a sale of the next presentation. *Held* that the application not being for benefit of lunatic, the Court would not interfere.—*Re Thorp*, L.R. 8 Ch. D. 59; 35 L.T. 293.
- (ii.) **C. A.—Payment out of Court—Disentailing Deed.**—A fund in Court represented land in settlement; a deceased tenant in tail had created a base fee: *Held* that the fund could not be paid out to his representative without disentailing deed enlarging base fee.—*In Re Reynolds*, L.R. 8 Ch. D. 61; 35 L.T. 298; 24 W.R. 991.
- (iii.) **C. A.—Lands Clauses Act—Investment.**—Purchase money of lunatics' land, taken by a public body, under the Lands Clauses Act, was, under the circumstances, ordered to be invested in guaranteed railway stock; the name of the public body was omitted from the title of the account.—*Re Buckingham*, L.R. 2 Ch. D. 690.
- (iv.) **L. J. J.—Mortgagees—Costs.**—A trustee lent money on mortgage and became lunatic; the mortgagor had no notice of the trust: *Held*, that the Costs of a petition to appoint a person to reconvey must be paid out of the Trust funds.—*Re Jones*, 45 L.J. Ch. 688.

Master and Servant:—

- (i.) **Ex. Div.—Negligence—Common employment.**—A gate of defendant's being out of repair and unsafe was kept wedged up and open, but on one occasion the gate being closed and unwedged fell, and injured plaintiff, a servant of defendant's: *Held* upon the evidence that the accident was attributable to negligence of a fellow servant by improperly moving the gate, or by not replacing it if moved by the wind or otherwise, and that plaintiff could not recover.—*Allen v. New Gas Co.*, L.R. 1, Ex. D. 251; 45 L.J. Ex. 668; 34 L.T. 641.
- (ii.) **C. A.—Negligence—Common employment.**—Plaintiff, assisting in shunting a horse-box, with consent of station-master, was injured by train negligently allowed by company's servants to come out of a siding: *Held* that plaintiff not being fellow servant or volunteer, Company were liable. *Wright v. London and North-Western Rail. Co.*, L.R. 1 Q.B.D. 252; 45 L.J.Q.B. 570.
- (iii.) **P. Div.—Negligence—Common employment.**—Defendant contracted with W. to sink a shaft, he was to employ and pay workmen, among whom was plaintiff. Steam power was to be provided, and an engineer was to be paid by defendants, but he was to be under W.'s orders. Plaintiff whilst at work was injured by negligence of the engineer: *Held* that the

plaintiff and the engineer were engaged in common employment under orders of W., and that defendants were not liable.—*Bourke v. White Moss Colliery Co.*, L.R. 1 O.P.D. 556; 85 L.T. 160.

- (iv.) **C. A.—Sub-Contractor—Privity of Contract.**—By agreement with defendants the S. Club held a cattle show in defendants' hall; the gate keepers were provided by defendants, but were under exclusive control of the Club; by rules of the Club a delivery order was to be given up before removal of the animals; by default of one of the gate keepers those sheep bought by plaintiff were mis-delivered. *Held*, affirming decision of C. P. Div., that there was not any privity of contract between plaintiff and defendants, and that they were not liable for the acts of the gate-keeper.—*Goslin v. Agricultural Hall Co.*, L.R. 1 O.P.D. 482; 85 L.T. 92.

Mines:—

- (i.) **Ex. Div.—Reservation.**—S. the owner in fee of land A and land B, granted land A to plaintiffs with reservation of right of mining on payment of damages for injury to buildings to be erected on the land by plaintiffs; defendants, assignees of S., worked mines under lands A and B: *Held* that plaintiffs were entitled to compensation in respect of workings under both pieces of land.—*Aspden v. Seddon*, 84 L.T. 906; 24 W.R. 828.

Mortgage:—

- (i.) **Ch. Div. V.C.M.—Equitable Mortgage—Arrears of Interest.**—Land, subject to an equitable mortgage, was taken by a Corporation and money paid into Court. *Held* that petition by mortgagee, under the Lands Clauses Act, was a suit within s. 42 of the statute of limitations, and that he was entitled only to principal and six years arrears of interest. *In re Stead's Settlement Trusts*, L.R. 2 Ch.D. 718; 45 L.J.Ch. 634; 24 W.R. 698.
- (ii.) **Ch. Div. V.C.H.—Equitable Mortgage—Locke King's Act.**—Absence of a memorandum does not take an equitable mortgage by deposit out of Locke King's Act (17 and 18 Vic., c. 113).—*Davis v. Davis*, 24 W.R. 962.
- (iii.) **H. L.—Forcible entry—Malicious prosecution.**—L., a mortgagee, entered into possession of the mortgaged premises, without notice to the mortgagor or T., his tenant, and was expelled therefrom by T.; L. indicted T. for assault, who, being acquitted, brought action against L. for malicious prosecution: *Held* that there was reasonable and probable cause for the prosecution, as the facts showed that L., at the time of his expulsion, was lawfully in possession.—*Lowe v. Telford*, L.R. 1 App. 414; 45 L.J. Ex. 618; 35 L.T. 69.
- (iv.) **C. A.—Registration—Priority.**—Actual notice, or fraud, is necessary to deprive a deed, registered in Middlesex, of priority over a prior unregistered charge.—*Lee v. Clutton*, 35 L.T. 84; 24 W.R. 942.
- (v.) **Ch. Div. V. C. B.—Transfer.**—A transferee, for value of a mortgage, without notice of equitable grounds entitling mortgagor to set aside the mortgage as against the original mortgagee, is entitled to the full benefit of his security.—*Nant-y-glo and Blaينا Ironworks Co. v. Tamplin*, 35 L.T. 125.

Municipal Law:—

- (i.) **C. A.—Public Pleasure Grounds.**—Land purchased by a local board, under the Public Health Act, 1848 s. 74, for purpose of public pleasure grounds, allowed to be appropriated to erection of a museum, free library, and conservatory, but not to the erection of a school of art or town buildings.—*Atty. Gen. v. Corporation of Sunderland*, L.R. 2 Ch. D. 634, 34 L.T. 921; 24 W.R. 991.
- (ii.) **App. Div. Ct.—Street.**—Respondent's premises were separated from D street by a small stream but connected therewith by two bridges: *Held*

that the premises "fronted and abutted" on D street, within Public Health Act, 1848 (11 & 12 Vict. c. 63) s. 69.—*Wakefield Local Board v. Lee*, L.R. 1 Ex. D. 336.

Negligence:—

- (i.) **C. P. Div.**—*Telegram—Remoteness of damage.*—Defendant, a collector of telegrams for profit, neglected to transmit a telegram in cipher entrusted to him, whereby plaintiff lost amount of commission on order, to which the telegram referred. *Held* that plaintiff could only recover nominal damages.—*Saunders v. Stuart*, L.R. 1 C.P.D. 326; 45 L.J. C.P. 682; 24 W.R. 949.

Nuisance:—

- (i.) **Ch. Div. M. R.**—*Artificial Work.*—The occupier of premises is liable for continuance thereon of any artificial work causing nuisance though placed on the premises by his predecessors in title.—*Broder v. Saillard*, L.R. 2 Ch. D. 692; 24 W.R. 1011.
- (ii.) **C. A.**—*Injunction—Damages.*—Where a nuisance by brick burning was proved, it was held that plaintiff was entitled to damages though her bill only asked for an injunction.—*Crawford v. Hornsea Steam Brick and Tile Co.*, 34 L.T. 923.
- (iii.) **Q. B. Div.**—*Liability of lessor.*—A. let to B. a field to be worked as a lime quarry; the blasting and smoke from the kilns caused nuisance to adjoining occupiers. *Held* that the nuisance was consequent on the mode of occupation contemplated by the demise, and that A. was liable.—*Harris v. James*, 45, L.J. Q.B. 545; 35 L.T. 240.
- (iv.) **App. Div. Ct.**—*Prohibition—Abatement.*—Appellants, the Urban Sanitary Authority of S., deposited refuse in a field for removal by purchasers thereof: the field was not in possession or under control of appellants; the deposit formed a nuisance. *Held* that an order under Public Health Act, 1875, (38 & 39 Vict., c. 55) for abatement of nuisance and prohibition of recurrence was bad as to the abatement, but good as to the prohibition.—*Mayor, etc., of Scarborough v. Rural Sanitary Authority of Scarborough*, L.R. 1 Ex. D. 344; 34 L.T. 768.

Partnership:—

- (i.) **H. L.**—*Agreement—Construction.*—A. borrowed £250 from B., and signed a paper declaring that in consideration of the £250 he undertook to execute a deed of co-partnership to B.; he afterwards wrote a letter to B. treating the matter as a loan, and tendered payment; B. filed bill for specific performance of agreement for partnership, when A. put in answer denying existence of partnership, but submitting in the alternative that it was a partnership at will, and had been determined by the letter. *Held* that a partnership at will had been constituted, and was determined, not by the letter, but by the answer.—*Syers v. Syers*, L.R. 1, App. 174; 33 L.T. 101; 24 W.R. 970.

Patent:—

- (i.) **Ch. Div. M. R.**—*Foreign Patent.*—English letters patent granted for a foreign invention after a foreign patent has been obtained, are to be taken as granted the day of the date not at the time of sealing.—*Holste v. Robinson*, 24 W.R. 1064.
- (ii.) **C. A.**—*Infringement—Crown Rights.*—*Held* that letters patent granted to plaintiff for manufacture of rifles did not affect right of Crown to use the invention, and that a company which had manufactured patented rifles by order of the Crown was protected against claims for infringement of patent.—*Dixon v. London Small Arms Co.*, L.R. 1, Q.B.D. 384; 35 L.T. 138; 23 W.R. 766.
- (iii.) **C. A.**—*Infringement—Disqualification as patentee.*—To bill to restrain infringement of patent, defendant pleaded defective specification, want of

novelty, anticipation, prior user of process, and that plaintiff was disqualified from being patentee from having acquired his knowledge as a gas referee, with statutory powers of inspection. *Held* that plaintiff's patent was not valid, as he had not discovered any new process but only more efficient method of working a formerly known process: *quære* whether he could take out a patent for discovery, the result of official investigation.—*Paterson v. Gaslight and Coke Co.*, 35 L.T. 11.

- (iv.) **Ch. Div. M. R.**—*Infringement—Novelty—Specification*.—Plaintiff in 1868 took out an American patent for roller-skates: drawings and letter press relating to the invention were published in America and received in the Patent Office in London before August, 1865, when plaintiff took out an English patent: in a suit to restrain infringement of the patent, defendant set up want of novelty: *Held* upon the facts that the invention had not become part of stock of public knowledge in England before the taking out of the English patent, and that no ordinary workman could have made the skates from the drawings and letter-press, and that the patent was therefore valid.—*Betts v. Neilson*, (37 L.J. Ch. 321); dissented from.—*Plimpton v. Malcolmson*, L.R. 3, Ch. 429; 45 L.J. Ch. 505; 34 L.T. 340.
- (v.) **C. A.**—*Licenses—Account*.—A licensee having been ordered to account for articles made under his license endeavoured to adduce evidence that plaintiff's patent was bad for want of novelty: *Held* that the evidence was not admissible.—*Trotman v. Wood* (16 O. B. N.S. 479) explained. *Adie v. Clark*, 24 W.R. 1007.

Petition of Right:—

- (i.) **Ch. Div. V. C. M.**—*Military Officer*.—An officer in permanent medical charge of a military prison, holds his appointment, subject to the rules and regulations of the service, and is liable to dismissal or removal at any time at the pleasure of the Crown: no petition of right will lie for alleged wrongful removal.—*Re Petition of Right of T. J. Tufnell*, 34 L.T. 888; 24 W.R. 915.
- (ii.) **Q. B. Div.**—*Sovereign and Subject—Statute of Limitations*.—The Sovereign is neither agent of, nor trustee for, her subjects: petition of right will not lie to recover a share of compensation money paid by a foreign government: the statute of limitations does not apply to a petition of right.—*Rustomjee v. The Queen*, L.R. 1 Q. B. D. 487; 45 L.J. Q. B. 249; 34 L.T. 278; 24 W.R. 428.

Poor Rate:—

- (i.) **Q. B. Div.**—*Appeal*.—An objection to assessment was made, under 27 & 28 Vict. c. 89 s. 1, to the assessment committee, who deferred their decision till decision of a pending case in a Superior Court with regard to a previous rate: the appellant thereupon appealed to Quarter Sessions: *Held* that the appellant had not "failed to obtain relief and that the appeal was premature".—*Regina v. Bedminster Union*, L.R. 1 Q. B. D. 503; 45 L.J. M.C. 117; 34 L.T. 795.
- (ii.) **App. Div. Ct.**—*Rateability—Lead Mine*.—A Company worked a mine under three leases; by the first a royalty of one-fourteenth of the minerals was reserved to the lessor, or at his option the value in money; by the second and third leases, the *reddendum* was wholly in money: *Held* that the Company must be rated in respect of the machinery, and buildings and surface lands, and the lessor of the first lease in respect of the royalty in kind.—*Van Mining Co. v. Overseers of Llandiloec*, L.R. 1 Ex. D. 310; 45 L.J. M.C. 138; 34 L.T. 692.

Practice:—

- (i.) **C. A.**—*Appeal—Affidavits*.—Affidavits to be used on appeal should be filed in the Division from which the appeal is made.—*Watts v. Watts*, 45 L.J. Ch. 658.

- (ii.) **C. A.—Appeal—Interlocutory Order.**—An appeal from a refusal of an interlocutory order may be set down without production of order or of copy thereof.—*Smith v. Grindley. Smith v. Charrington*, L.R. 3 Ch.D. 80; 35 L.T. 112; 24 W.R. 956.
- (iii.) **C. A.—Appeal—Costs.**—On motion to commit a defendant not being pressed, V.C.B. made no order except that defendant should pay the plaintiff's costs; defendant appealed without leave: *Held* that the order was not as to costs which are within the discretion of the Court, and that the appeal was not prohibited by Judicature Act, 1873, s. 49.—*Witt v. Corcoran*, 45 L.J.Ch. 803; 24 W.R. 501.
- (iv.) **C. A.—Appeal—Costs—Security.**—Ord. 58, R. 15.—Appellants from the Admiralty Division will not be ordered except under special circumstances to give security for costs.—*The Victoria*, L.R. 1 P.D. 280; 34 L.T. 931; 24 W.R. 596.
- (v.) **C. A.—Appeal—Costs—Security.**—The Court refused to require insolvent appellant to give security for costs of appeal where question at issue had not been considered in a Court of Error.—*Rourke v. White Moss Colliery Co.*, L.R. 1 C.P.D. 556.
- (vi.) **C. A.—Appeal—Costs—Security.**—Where security for costs of appeal was ordered, a bond with securities was allowed: costs of the application to follow result of appeal.—*Phosphate Sewage Co. v. Hartmont*, L.R. 2 Ch.D. 811.
- (vii.) **C. A.—Appeal—Evidence.**—The decision of a judge on questions of fact after hearing evidence will not generally, but his inferences from the evidence may, be reversed by the Court of Appeal. *The Glanvibanta. The Transit*, L.R. 1 P.D. 288; 84 L.T. 934; 24 W.R. 1083.
- (viii.) **C. A.—Appeal—Stay of proceedings.**—Proceedings stayed, pending appeal from order for payment of money by defendant, on payment of money and costs of application into Court.—*Cooper v. Cooper*, L.R. 2, Ch. D. 492; 45 L.J.Ch. 667; 24 W.R. 628.
- (ix.) **C. A.—Appeal—Time.**—The time for appealing from the refusal of an interlocutory order, when an order is, nevertheless, made as to costs of the application, runs from the refusal, not from the entering of the order as to costs: the Chancery Division has, in causes within its exclusive jurisdiction, discretionary power to refuse a jury.—*Swindell v. Birmingham Syndicate*, 35 L.T. 111; 24 W.R. 911.
- (x.) **C. A.—Appeal to House of Lords.**—The practice as to appeals to House of Lords is not altered by Judicature Acts or Rules: on appeal from C.A. in action attached to a Common Law Division appellant must give bail in error to entitle him to stay of execution pending appeal: application for enlargement of time for giving bail in error must be made to the Division to which the action is attached.—*Justice v. Mersey Steel and Iron Co.*, L.R. 1 C.P.D. 575; 24 W.R. 955.
- (xi.) **Q. B. Div.—Appeal from Inferior Court.**—Application for rule to justices to state case under 20 & 21 Vict., c. 43, should be made Q. B. Div. not to Divisional Court of Appeal.—*Re Ellershaw*, L.R. 1 Q.B.D. 481.
- (xii.) **Q. B. Div.—Appeal from Justices.**—Under the Public Health Act, 1875, s. 48, the time within which notice of appeal from the order of Justices must be given runs from the decision of the Court not from service of the order.—*Regina v. Barnet Rural Sanitary Authority*, L.R. 1 Q.B.D. 558; 45 L.J. M.O. 105.
- (xiii.) **Ch. Div. V. C. M.—Attachment**—Ord. 44 r. 2.—*Held* that a writ of attachment in a suit in which plaintiff was on 1st Nov., 1875, in a position to give notice of motion for decree must be discharged, having been made without notice to defendant under Ord. 44 r. 2.—*Dallas v. Glyn*, 34 L.T. 897; 24 W.R. 881.

- (xiv.) **Ch. Div. M. R.—Attachment—Costs.**—The costs of attachment are now by order 55, r. 1, in discretion of court and should be applied for at the same time as the writ.—*Abud v. Riches*, L.R. 2, Ch. D. 528; 45 L.J. Ch. 649; 34 L.T. 713; 24 W.R. 637.
- (xv.) **Ch. Div. V. C. H.—Costs—Charging order.**—Where a party has been ordered to pay costs when taxed, a charging order may be made before taxation.—*Burns v. Irving*, 34 L.T. 752.
- (xvi.) **Ch. Div. V. C. H.—Costs—District Registry.**—Where administration decree ordered accounts and enquiries in a District Registry and future consideration in London, the Court refused to allow taxation in the District Registry.—*Irlam v. Irlam*, 24 W.R. 949.
- (xvii.) **Ch. Div. V. C. B.—Costs—Counsel's Fees.**—Held that the Taxing Master has discretionary power to allow refreshers to counsel where it appears to him reasonable.—*Smith v. Daniell*, 34 L.T. 899.
- (xviii.) **Q. B. Div.—Costs—Plea of Bankruptcy.**—A plea of bankruptcy of plaintiff after action brought waives all prior defences, and when confessed by plaintiff entitles him to sign judgment for his costs.—*Foster v. Gamgee*, 45 L.J. C. B. 576; 34 L.T. 248; 24 W.R. 319.
- (xix.) **Ch. Div. M. R.—Costs—Security.**—A shareholder of a Company appearing to oppose a winding up petition, cannot be required to give security for costs, on the ground that he is resident abroad.—*R. Percy & Kelly Cobalt & Co., Mining Co.*, L.R. 2 Ch. D. 531; 45 L.J. Ch. 526; 24 W.R. 1057.
- (xx.) **Ch. Div. V. C. B.—Costs—Security.**—The court will generally follow the old rule as to amount of deposit as security for costs.—*Paxton v. Bell*, 24 W.R. 1013.
- (xxi.) **C. A.—Costs—Security.**—Where security for costs had been given in a suit instituted before November, 1875: Held that further security to cover future costs must be given, under Ord. 55 of Rules of Court, February 1876: Order of Malins V. C. (34 L.T. 675: 24 W.R. 888) reversed.—*Rep. of Costa Rica v. Erlanger*, L.R. 3 Ch. D. 62; 35 L.T. 19; 24 W.R. 955.
- (xxii.) **Ch. Div. M. R.—Default of Appearance—Ord. 19 r. 6.**—Notice of motion for judgment, if no appearance has been entered by the party to be served, is sufficiently delivered by being filed under Ord. 19, r. 6.—*Dymonds v. Croft*, 45 L.J. Ch. 612; 35 L.T. 27; 24 W.R. 700.
- (xxiii.) **C. A.—Default of Appearance—Ord. 19, r. 6.**—Such delivery in case of default of appearance is sufficient.—*Morton v. Miller*, 45 L.J. Ch. 613; 23 W.R. 723.
- (xxiv.) **Ch. Div. V. C. H.—Discovery—Affidavit.**—In an action relating to land defendant must, in affidavit of documents, specify in detail all documents in his possession relating to the land, even though such documents relate only to his own title.—*Fortescue v. Fortescue*, 34 L.T. 847; 24 W.R. 945.
- (xxv.) **Ch. Div. V. C. B.—Discovery—Affidavit.**—Where defendant in schedule, to affidavit of documents gave dates but no further particulars of deeds which he stated related solely to his own title: Held that the affidavit was sufficient.—*Taylor v. Oliver*, 34 L.T. 962.
- (xxvi.) **H. L.—Discovery—Affidavit.**—Appellants filed insufficient affidavit of documents after repeated extensions of time, Court of Chancery ordered that unless a sufficient affidavit was filed by a day named, the bill should be dismissed, and a fund in Court paid over to defendant. Held that the Court had power to make the order, and that its discretion ought not to be interfered with.—*Republic of Liberia v. Rose*, L.R. 1 App. 139; 45 L.J. Ch. 297; 34 L.T. 145; 24 W.R. 967.
- (xxvii.) **C. A.—Discovery—Interrogatories.**—Defendant is not entitled to have

- interrogatories struck out merely because delivered by plaintiff with the statement of claim, but only if plaintiff on being called upon fails to shew that the matter inquired after is material at that stage of the action. *Mercier v. Cotton*, L.R. 1 Q.B.D. 442; 35 L.T. 79; 24 W.R. 566.
- (xxviii.) **Ch. Div. M. R.**—*Discovery—Interrogatories*.—Leave will not generally be given to defendant to serve interrogatories before delivery of defence.—*Disney v. Longbourne*, L.R. 2 Ch. D. 704; 45 L.J.Ch. 532; 35 L.T. 301; 24 W.R. 663.
- (xxix.) **C. P. Div.**—*Discovery—Privilege*.—Documents written "in confidence," by third parties in answer to inquiries by solicitor of party to a suit with a view to, and in contemplation of, anticipated litigation, are privileged.—*M'Corquodale v. Bell*, L.R. 1, C.P.D. 471; 35 L.T. 261; 24 W.R. 399.
- (xxx.) **C. A.**—*Discovery—Privilege*.—A letter of unprofessional agent to his principal is not privileged from discovery, though written after commencement of litigation with regard to matter subject of the suit, on which principal requested information.—*Anderson v. Bank of British Columbia*, L.R. 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624.
- (xxxi.) **C. A.**—*Discovery—Privilege*.—*Held* that, under Order 31 r. 11, a judge has no discretion to refuse production of documents, except on ground of privilege; also that confidential letter of non-legal agent, containing mere matter of opinion, was not protected from discovery on ground of privilege. — *Bustros v. White*, L.R. 1 Q.B.D.423; 45 L.J. 642; 34 L.T. 835; 24 W.R. 721.
- (xxxii.) **Ch. Div. V.C.H.**—*Discovery—Production*.—Order 31 r. 20 does not make it imperative on the Court to dismiss an action where plaintiff has failed to comply with order for production of documents.—*Hartley v. Owen*, 34 L.T. 752.
- (xxxiii.) **C. A.**—*Evidence—Affidavit*.—*Held* that affidavits were properly sworn before a juge de paix and other officials in Belgium, having limited jurisdiction and power to administer oaths in the district.—*Kevan v. Crawford*, 45 L.J. Ch. 658.
- (xxxiv.) **Ch. Div. V. C. H.**—*Injunction—Winding-up Petition*.—Where a company is in liquidation an injunction in restraint of pending actions may be granted by the Court in which the winding-up petition is presented.—*Re City of London Supply Association & Clerks Club*, 34 L.T. 346.
- (xxxv.) **C.A.**—*Interlocutory Order—Receiver*.—Ord. 52, r. 4.—Interim receiver appointed by Court of goods comprised in an agreement to execute a bill of sale where mortgagor's bankruptcy was imminent.—*Taylor v. Eckerley*, 45 L.J.Ch. 527; 24 W.R. 450.
- (xxxvi.) **C. A.**—*Interlocutory order—Receiver*.—In action for specific performance in which judgment had been given for defendant, the plaintiff having appealed, the Court of Appeal appointed plaintiff receiver and manager of the property in question without security, on his undertaking to abide by order of the Court.—*Hyde v. Warren*, L.R. 1 Ex.D. 809.
- (xxxvii.) **Ex. Div.**—*Leave to defend writ specially indorsed*.—Ord. 14, r. 1.—*Held* that a surety whose principal does not admit the debt, and who has received no particulars of demand, will have leave to defend writ specially indorsed without payment into Court or giving security; also that Ord. 14, rr. 1, 3, 6 apply only to cases which are on defendant's admission really undefended.—*Lloyds Banking Co. v. Ogle*, L.R. 1 Ex.D. 262; 45 L.J.Ex. 606; 34 L.T. 584; 24 W.R. 678.
- (xxxviii.) **Ch. Div V.C.H.**—*Motion for judgment—Dismissal*.—A party claiming dismissal of action for want of prosecution is not a party claiming relief within Order 40 r. 11.—*Litton v. Litton*, 24 W.R. 963.

- (xxxix.) **C. A.**—*Motion for judgment—Partition.*—Where in partition action plaintiff's title was admitted on the pleadings, enquiry as to persons interested in the property was ordered on motion for judgment under Order 40 r. 11.—*Gilbert v. Smith*, L.R. 2 Ch. D. 686; 45 L.J.Ch. 514; 35 L.T. 43; 24 W.R. 568.
- (xl.) **C. A.**—*Motion for new trial.*—Order 89 r. 1. In computing the time within which application must be made for new trial, days on which the Divisional Court is not sitting are not to be reckoned.—*Hallams v. Hills*, 24 W.R. 956.
- (xli.) **C. P. Div.**—*Judgment—Removal.*—After removal of judgment from inferior to superior Court, the latter has no jurisdiction to set aside the judgment on the merits, or for irregularity of proceedings.—*Williams v. Bolland*, L.R. 1, C.P.D. 227; 34 L.T. 904; 24 W.R. 644.
- (xlii.) **Ch. Div. V.C.B.**—*Parties—Joinder.*—Ord. 16 r. 13.—A. after agreeing to purchase land received notices of claims from C. D. and E. In action by B. for specific performance, the Court gave leave to A. to serve C. D. and E. with notice of motion to joint them as *parties* under Order 16, r. 13, but afterwards refused the motion with costs.—*Harry v. Davey*, L.R. 2 Ch.D., 721; 45 L.J.Ch. 697; 34 L.T. 842; 24 W.R. 515.
- (xliii.) **Q. B. Div.**—*Parties—Joinder.*—Held that Court will not in action brought by one of many joint owners of a ship against the charterers under Ord. 16, r. 9, join parties as plaintiffs merely so as to secure defendant's costs.—*De Hart v. Stevenson*, L.R. 1 Q.B.D. 313; 45 L.J.Ch. 575; 24 W.R. 367.
- (xliv.) **P. D. & A. D.**—*Parties—Probate action.*—The practice of citing heir-at-law, devisees, &c. in probate actions, is not altered by Judicature Acts.—*Kennaway v. Kennaway*, L.R. 1 P.D. 148; 45 L.J.P.D.A. 86; 34 L.T. 854; 24 W.R. 586.
- (xlv.) **C. A.**—*Parties—Third party order.*—Third party notice under Ord. 16, r. 18, may be given, although the whole question between plaintiff, defendant, and the third party may not be identical, provided any material question in the action is also a question between the defendant and the third party.—*Swansea Shipping Company v. Duncan*, L.R. 1 Q.B.D. 644.
- (xlvi.) **C. A.**—*Parties—Third party order.*—The Court has power to order notice to be served on a third party, if there is any one question common to all parties, but the exercise of such power is discretionary.—*Bower v. Hartley*, L.R. 1 Q.B.D. 652; 24 W.R. 941.
- (xlvii.) **Q. B. Div.**—*Parties—Third party order.*—Held that under the circumstances a third party brought in as a defendant must confine his defence to one only of the points at issue; the cost of all parties to be settled by the judge after the trial.—*Benecke v. Frost*, L.R. 1 Q.B.D. 419; 45 L.J. Q.B. 693; 34 L.T. 728; 24 W.R. 669.
- (xlviii.) **C. P. Div.**—*Pleading—Admissions—Signing judgment.*—Where in action by lessor on covenant to pay rent defendant denied liability as being neither lessee nor assignee of lease, but admitted occupation of premises and payment of rent except for last eighteen months of such occupation: Held that though the form of plaintiff's action and precise legal position of defendant were not determined, yet on the admission of the pleadings as to facts, plaintiff was entitled at once to sign judgment for eighteen months' rent.—*Lord Hammer v. Flight*, 35 L.T. 127; 24 W.R. 846.
- (xlix.) **Ch. Div. V.C.B.**—*Pleading—Amendment.*—Fresh facts should generally be stated, not in reply, but by amendment of statement of claim.—*Earp v. Henderson*, 34 L.T. 844.
- (l.) **C. A.**—*Pleadings—Amendments.*—The Court of Appeal will not generally interfere with the discretion of a judge in striking out a pleading or

allowing it to be amended.—*Watson v. Rodwell*, 35 L.T. 86; 24 W.R. 1009.

- (ii.) **Ch. Div. V.C.B.**—*Pleading—Amendment*.—A suit came to issue, before the new practice, to set aside a settlement on the ground of fraud; after the evidence was complete it was discovered that plaintiff had been unable to execute the settlement from mental incapacity: *Held* that the bill might be amended under Ord. 27 r. 1, and fresh affidavits filed.—*Roe v. Davies*, L.R. 2 Ch.B. 729; 24 W. 606.
- (iii.) **Ch. Div. V.C.H.**—*Pleading—Counter-claim*.—A counter-claim will be excluded from a defence under Ord. 22 r. 9, if it introduces matter better dealt with in a separate action, or likely unduly to prejudice and delay plaintiff.—*Padwick v. Scott*, L.R. 2 Ch.D. 736; 45 L.J.Ch. 350; 24 W.R. 723.
- (liii.) **Ch. Div. M.R.**—*Pleading—Demurrer*.—A statement of claim set out a decree in a former suit declaring that the plaintiffs in that and the present suit had, together with other owners and occupiers of land in Epping Forest, a general right of common, and stated that the defendant occupied certain waste lands and had enclosed the same, thereby interfering with the common right: *Held* that defendant was bound by the declaration, but might show either a special ground of exemption, or that the decree had been fraudulently obtained.—*Commissioners of Sewers v. Gellatly*, 24 W.R. 1059.
- (liv.) **C. P. Div.**—*Pleadings—Striking out*.—*Held*, in an action to recover money on the ground of fraud, that statements in the pleading, to the effect that defendant had acted, in a similar manner on other occasions, must be struck out as irrelevant.—*Blake v. Albion Life Insurance Co.*, 45 L.J. C.P. 663; 35 L.T. 269; 24 W.R. 677.
- (lv.) **Ch. Div. V. C. H.**—*Pleadings—Striking out*.—The rule as to striking out or amending pleadings, under Ord. 27, r. 1, or Ord. 59, will not be applied to a reply joining issue generally to a counter-claim, because it does not deal specifically with the allegations thereof.—*Rolfe v. Maclaren*, L.R. 3 Ch.D. 106. 24 W.R. 816.
- (lvi.) **C. P. Div.**—*Reference*.—An order was made for reference of a cause pending 1st November, 1875, with directions to Master to continue proceedings under the new practice: *Held* that this was a reference under the Common Law Procedure Acts for the final decision of the Master.—*Cruikshank v. Floating Swimming Baths Co.*, L.R. 1, C.P.D. 260; 45 L.J.C.P. 684; 34 L.T. 733; 24 W.R. 644.
- (lvii.) **Ch. Div. V. C. H.**—*Revivor*.—Where infant interested in a suit is born after decree, an order may be obtained binding him by all proceedings up to his birth, and a summons may be taken out calling on him to show cause why subsequent proceedings should not bind him.—*Scruby v. Payne*, 34 L.T. 845.
- (lviii.) **Ex. Div.**—*Service out of jurisdiction*.—Whether service out of jurisdiction ought to be allowed, under Ord. 11, is a question for decision of a judge in Chambers, subject to appeal, and defendant cannot raise the question by his statement of defence.—*Preston v. Lamont*, L.R. 1 Ch.D. 361; 24 W.R. 928.
- (lix.) **Q. B. Div.**—*Service out of jurisdiction*.—In an action for breach of a contract made and broken in England: *Held* that under Ord. 11, r. 1, an order could be made for service of the writ on defendant out of the jurisdiction.—*Green v. Browning*, 35 L.T. 760.
- (lx.) **P. D. & A. Div.**—*Service out of jurisdiction—Foreign Company*.—Leave refused to issue writ of summons, of which notice should be given, out of jurisdiction, against a foreign company in respect of damages done by a ship belonging to them on the high seas. *In Re Smith*, L.R. 1 P.D. 300.

- (lxi.) **Q. B. Div.**—*Service out of jurisdiction—Foreign Corporation*—Service out of the jurisdiction of notice of a writ of summons may be made on a foreign corporation, under Ord. 11, r. 1, and no order to proceed is necessary before signing interlocutory judgment on default of appearance.—*Scott v. Royal Wax Candle Co.*, L.R. 1 Q.B.D. 404; 45 L.J.Q.B. 586; 34 L.T. 683; 24 W.R. 668.
- (lxii.) **C. A.**—*Service—Substitution*.—Where effectual personal service of writ on defendants could not be effected, the court refused to order substituted service; service cannot be effected on a colonial government.—*Sloman v. Government of New Zealand*, L.R. 1 C.P.D. 503.
- (lxiii.) **C. A.**—*Service—Substitution*.—Held that endorsement upon the writ of the date of substituted service is not, as in case of ordinary service, under Order 9, r. 13, necessary to enable plaintiff to proceed in default of appearance.—*Dymond v. Croft*, 45 L.J.Ch. 604; 34 L.T. 786; 24 W.R. 842.
- (lxiv.) **Ch. Div. V. C. H.**—*Service—Substitution*.—Where defendant had absconded, ordered substituted service of writ by leaving copy at his office, and best known address, and that notice of service be inserted in the "Times".—*Cook v. Day*, 45 L.J.Ch. 611; 24 W.R. 362.
- (lxv.) **Q. B. Div.**—*Special Case*.—Ord. 34, r. 2.—Where by indorsement of writ, and by plaintiff's affidavit, it was shown that a question of law ought to be decided before further proceedings: Held that the judge was right in ordering a special case, to be stated before delivery of statement of claim.—*Metropolitan Board of Works v. New River Co.*, 45 L.J.Q.B. 759.
- (lxvi.) **Ch. Div. V. C. B.**—*Stay of Proceedings*.—Equitable mortgagee commenced action to establish charge and for administration; another creditor subsequently obtained the usual administration decree on summons: ordered stay of proceedings in first action on enquiry as to circumstances, and the mortgagee to have conduct of the proceedings.—*Matthews v. Matthews*, 45 L.J. Ch. 711; 34 L.T. 718.
- (lxvii.) **Q. B. Div.**—*Stay of Proceedings*.—Where a military officer brought actions for conspiracy against members of a military court of enquiry, the alleged conspiracy being the agreement they came to as to the report on his conduct to be sent in to the Commander-in-Chief, the Court ordered stay of the proceedings as being groundless and vexatious and an abuse of the process of the Court.—*Dawkins v. Prince Edward of Saxe Weimar*, L.R. 1, Q.B.D. 499; 45 L.J. Q.B. 567; 24 W.R. 567.
- (lxviii.) **C. A.**—*Trial*.—Action against A. and B. resulted in a verdict against A. only. A. obtained order for new trial, which was afterwards discharged. Held that Court had jurisdiction to call on B. to show cause why a new trial should not be had as to him, and on merits of the case made the order for new trial absolute.—*Parnell v. Great Western Co.*, L.R. 1, Q.B.D. 636; 45 L.J. Q.B. 687; 34 L.T. 822; 24 W.R. 720.
- (lxix.) **Ch. Div. V. C. H.**—*Trial*.—The Chancery Division has no power to try cases with a jury; where such trial is demanded the case must be sent to Middlesex or some other county to be named by the plaintiff.—*Clarke v. Cookson*, L.R. 2, Ch. D. 746; 34 L.T. 646; 24 W.R. 535.
- (lxx.) **Ch. Div. V. C. B.**—*Trial*.—Under Ord. 36, r. 1, the plaintiff in a Chancery action may by statement of claim demand trial by jury and fix the place of trial.—*Redmayne v. Vaughan*, 24 W.R. 983.
- (lxxi.) **Ch. Div. M. R.**—*Vacation of Registration*.—An application to vacate registration of a lis pendens, after determination of suit, need not be by fresh action, but may be made in the matter of the Act and of the suit.—*Clutton v. Lee*, 45 L.J. Ch. 684; 24 W.R. 607.

Principal and Agent:—

- (i.) **C. P. Div.**—*Commission*.—Defendant employed plaintiff to negotiate a loan of £10,000 from W., and paid to plaintiff the stipulated commission

thereon; defendant subsequently entered into partnership with W., who advanced a further sum of £4,000 by way of capital: it was admitted by plaintiff that the latter loan was not contemplated on the advance of the former, but that the £4,000 was advanced solely in consequence of the partnership. *Held* that plaintiff was not entitled to commission on the £4,000.—*Tribe v. Taylor*, L.R. 1, C.P.D. 505.

- (ii.) **Ch. Div. V. C. B.**—*Commission*.—S. employed B. & Co. as his agents to (inter alia) effect insurances on his ships, and they used to collect the insurance moneys for lost ships for him on commission: on one occasion S. demanded of B. & Co. the policies on a lost ship that he might collect the moneys himself. B & Co. refused to give the policies up and collected the moneys. *Held* that their authority had been revoked, and that they were not entitled to the usual commission.—*Baring v. Stanton*, 35 L.T. 123.
- (iii.) **C. A.**—*Liability—Broker*.—Defendant, a broker, sent to plaintiff contract note as follows:—"I have this day sold by your order and for your account to my principals about 5 tons of anthracene—W. A. Bowditch." *Held* that defendant was not personally liable for price of goods.—*Southwell v. Bowditch*, L.R. 1, C.P.D. 374; 45 L.J., C.P. 630; 35 L.T. 196; 24 W.R. 838.
- (iv.) **C. A.**—*Liability—Broker*.—Fruit brokers at Liverpool sent to plaintiff a sold note, "We have this day sold to you on account of J. M. & Co., Valencia, 2,000 cases of oranges," and signed it without any qualification: in action against the brokers for non-delivery of goods, *Held*, reversing decision of Ex. Div., that the words "on account of J. M. & Co." freed the brokers from liability on the contract.—*Gadd v. Houghton*, L.R. 1, Ex. D. 357; 35 L.T. 222; 24 W.R. 975.
- (v.) **C. A.**—*Liability—commission*.—K. contracted by letter to purchase goods of plaintiff; the letter stated that K. bought as agent of defendants, and contained terms of contract, and provided for K.'s commission, but was not signed "as agent." *Held* that the defendant was liable as purchaser of the goods.—*Concordia Chemische Fabric auf Actien v. Squire*, 34 L.T. 824.
- (vi.) **H. L.**—*Liability—Stock-jobber*.—M. through broker contracted with jobber for sale of shares: on name day N. passed to M. as purchaser of shares name of person who turned out to be a minor; M. executed transfer and received price. *Held* that jobber not having passed name of a person competent to contract was bound to indemnify M. from calls in respect of shares.—*Nickalls v. Merry*, L.R. 7, H.L. (E. & T.) 530; 45 L.J. Ch. 575.

Principal and Surety:—

- (i.) **H. L.**—*Agreement between Sureties*.—A., B., C. & D. were sureties for various bills of E.; in no instance had they all joined, and the amounts of their liabilities differed; an agreement was drawn up and signed by C., B. and D. that as between themselves the parties would each contribute $\frac{1}{4}$ of the amount required to meet liabilities. *Held* that upon the construction of the agreement it was the intention that such contribution should only be in the first instance and not to alter the existing rights and liabilities.—*Arcedeckne v. Howard*, 45 L.J. Ch. 622.
- (ii.) **Q. B. Div.**—*Joint-debtors—Notice*.—R. & H. in partnership had bill transactions through plaintiffs whereby if remittances did not enable plaintiffs to meet bills when due defendants were bound to make up deficiency; this was by long practice frequently done by means of fresh bills accepted by plaintiffs, which defendants negotiated and handed proceeds to plaintiffs; on dissolution of partnership, of which plaintiffs had notice, outstanding acceptances were met by fresh drafts of H. alone; on sale of goods, there being a deficiency, plaintiffs brought action against R. & H. *Held* that R. & H. could not as against the plaintiffs be treated

as principal and surety, and that the giving time to H. did not discharge R.—*Oakley v. Pasheller* (4 Cl. & F. 207) distinguished.—*Swire v. Redman*, L.R. 1, Q.B.D. 536; 24 W.R. 1069.

Probate:—

- (i.) **P. D. & A. Div.—Attestation.**—Testatrix after making her will signed a paper giving additional legacies; the paper was pinned to the original will, and was signed on the back by two witnesses. *Held* that the paper was admissible to probate.—*In the goods of Braddock*, 24 W.R. 1017.
- (ii.) **P. D. & A. Div.—Domicile**—24 & 25 Vict., c. 114, s. 2.—An Italian having been naturalized in England made his will according to English Law, but afterwards he went back to Italy and died domiciled there. *Held* that the will must be admitted to probate.—*In the goods of Gally*, 24 W.R. 1018.
- (iii.) **Ch. Div. V. C. B.—Executor—Costs.**—Costs of litigation as to probate of a will were allowed to the executors in an administration suit.—*Re Harrison, Fulton v. Andrew*, 24 W.R. 979.
- (iv.) **P. D. & A. Div.—Incorporation—English and American wills.**—Testator executed will with 9 codicils disposing of property in America, and subsequently a will with 8 codicils disposing of property in England; in latter will he desired that it should be treated as a separate testamentary document, but if not, that it should be regarded as a codicil to American will; Court granted probate of English will and codicils, without incorporating the American will and codicils, but directed affidavit of execution thereof to be filed and a note of filing to be appended to probate.—*In the goods of Astor*, L.R. 1 P.D. 150; 45 L.J. P.D. & A. 78; 34 L.T. 824; 24 W.R. 539.
- (v.) **P. D. & A. Div.—Incorporation—Revocation by marriage.**—Testator in a will, made after his marriage, directed that if his wife should die without issue a will made before his marriage should be revived; on his death leaving widow and infant children: *Held* that first will must be incorporated in probate of the later will.—*In goods of Bangham*, 45 L.J.P.D. & A. 80; 24 W.R. 712.
- (vi.) **C. A.—Jurisdiction.**—Testator gave all his property to his wife, and appointed her executrix; the heir-at-law and sole next-of-kin filed a bill to have her declared a trustee for him on the ground of fraud: *Held* that the matter was within the exclusive jurisdiction of the Court of Probate.—*Meluish v. Milton*, L.R. 3 Ch.D. 27; 35 L.T. 82; 24 W.R. 892.
- (vii.) **P. D. & A. Div.—Special circumstances.**—20 and 21 Vic., c. 77, s. 73.—Where the insolvency of an intestate's estate was disputed, and the sole next-of-kin was alleged to be of low position and bad character: *Held* that there were "special circumstances," and probate granted to a creditor.—*In the goods of Ferrands*, 24 W.R. 1018.
- (viii.) **P. D. A. Div.—Revocation—Revival.**—Testator, on marriage, executed codicil, confirming previous will; on his wife's death he destroyed the codicil: *Held* that the destruction was not animo revocandi, and granted probate of will and codicil.—*James v. Shrimpton*, 45 L.J.P.D. & A. 85; 24 W.R. 740.

Railway:—

- (i.) **Q. B. Div.—Carrier—Felony of Servant.**—Valuable pictures, not declared, were given to defendants for carriage, and were stolen by a man who falsely represented himself to defendants' clerk as in the employ of defendants, and obtained from him a pass and delivery sheet. *Held* that the defendants were not liable.—*Way v. Great Eastern Railway Company*, 35 L.T. 253.
- (ii.) **C. A.—Carriers—Goods carried beyond destination.**—Pictures above the value of £10 were, without notice by owner, as required by the Carriers'

Act, s. 1, carried in a train by which the owner travelled; through negligence of defendants' servants the pictures were carried beyond their destination and were then injured: *Held* that defendants continued to hold the pictures as carriers and were protected by the Act.—*Morritt v. North Eastern Railway Co.*, 34 L.T. 940; 24 W.R. 886.

- (iii.) **App. Div. Ct.—Carriers—Passenger.**—Plaintiff took a ticket from B. to L., but owing to floods the train was delayed between B. and D., and failed to catch corresponding train from D. to L.; the station master at D. told plaintiff that there were no more trains that night, but that the usual train would run next day, by that time the line between D. and L. became impassable: *Held* that the contract was that the company would use due diligence to catch the corresponding train at D., and as the failure to do so was unavoidable, they were not bound to forward plaintiff by special train, nor were liable in damages.—*Fitzgerald v. Midland Rail. Co.*, 34 L.T. 771.
- (iv.) **Ex. Div.—Passengers' luggage.**—S. 7 of the Railway and Canal Traffic Act, 1854, (17 & 18 Vict., c. 31) is incorporated in the Regulation of Railways Act, 1868, (31 & 32 Vict., c. 119) and therefore applies to luggage conveyed by railway companies on board steam vessels.—*Cohen v. S. Eastern Rail. Co.*, L.R. 1, Ex. D. 217; 45 L.J. Ex. 298; 35 L.T. 213; 24 W.R. 522.
- (v.) **H. L.—Carriers—Services.**—The Lancashire and Yorkshire Railway Company were empowered by their Special Act, 22 & 23 Vict., c. 110, s. 66, to make a further charge beyond the maximum rate thereby fixed with respect to conveyance of coal, for services incidental to the business of a carrier. *Held* that neither the taking of wagons from private siding and attaching them to trains of Company, nor permission to stack coals on land of company, were services within the exception. Also, under s. 73, that a restriction requiring at least 15 wagons at a time to be made up, was reasonable. Also, that award by arbitrator to colliery owner, of damages for loss of customers through restriction was right.—*Lancashire and Yorkshire Railway Company v. Gidlow*, L.R. 7, H.L. 518; 45 L.J. Ex. 625; 24 W.R. 144.
- (vi.) **C. P. Div.—Deposit of luggage.**—On depositing luggage at cloak room of railway station, plaintiff received a ticket at foot of which was printed "see back;" on the back were conditions restricting liability of the company; plaintiff neither had read nor knew of conditions. *Held* that the company were liable for the loss of the luggage.—*Parker v. S. E. Rail. Co.*, L.R. 1, C.P.D. 618; 45 L.J. C.P. 515; 34 L.T. 654.
- (vii.) **Q. B. Div.—Deposit of luggage.**—On depositing luggage at the cloak-room of a railway station, plaintiff received a ticket at the foot of which was printed "subject to the conditions on the other side;" on the back were conditions exempting the company from responsibility for goods above a certain value; plaintiff neither had read nor knew of the conditions: *Held* that the luggage was deposited subject to the conditions, and that the company were protected thereby.—*Harris v. Great Western Railway Co.*, L.R. 1, Q.B.D. 515; 45 L.J. Q.B. 729; 34 L.T. 647.
- (viii.) **Ex. Div.—Negligence.**—Owing to the length of a train, some of the carriages overshot the platform of a station, and plaintiff, a passenger, in alighting beyond the platform was injured; plaintiff and several passengers did not hear any caution to keep their seats, but there was evidence that such caution was given. *Held* upon the facts that there was no evidence of negligence on the part of the company's servants.—*Rose v. North Eastern Railway Company*, 34 L.T. 761.
- (ix.) **Q. B. Div.—Negligence.**—An administratrix sued first under Lord Campbell's Act and afterwards for damage to personal estate of the deceased: *Held*, that judgment under the first action was no bar to the second, and that findings of the jury in the first action were no estoppel

to defence in the second.—*Leggott v. Great Northern Rail. Co.*, L.R. 1 Q.B.D. 559; 45 L.J.Q.B. 557; 24 W.R. 784.

- (x.) **Q. B. Div.—Negligence.**—Where a passenger, instead of crossing the line by a bridge, walked across the rails and was injured by falling into an excavation, there being no evidence of any incitation on the part of the Company's servants: *Held* that the Company were not liable for negligence.—*Wilby v. Midland Rail. Co.*, 35 L.T. 244.
- (xi.) **Ch. Div. M. R.—Regulation of Railways Act, 1842.**—When the report of a Board of Trade inspector states that the opening of a railway would be dangerous by reason of incompleteness of works, the Board of Trade has absolute jurisdiction to postpone such opening; incompleteness includes imperfection or defect generally.—*Attorney General v. Great Western Rail. Co.* 35 L.T. 302; 24 W.R. 1015.
- (xii.) **H. L.—Running powers.**—Appellants, in consideration of a loan, agreed to grant to respondents running powers over their line on certain specified terms; differences under the agreement to be settled by arbitration under Railway Cos.' (Arbitration) Act, 1859. No limit of time was mentioned nor any power of revocation given to either party: *Held* (affirming decision of L. J. J.) that the agreement was not terminable by notice.—*Ilanelly Railway and Dock Co. v. London and North-Western Railway Co.*, 45 L.J. Ch. 539; 23 W.R. 927.

Revenue:—

- (i.) **C. A.—Inhabited house duty.**—*Held* that 7 blocks of buildings each consisting of distinct sets of rooms with separate door to every set, opening on common staircase, some let as offices and business and residential chambers, and some being unlet, were chargeable for inhabited house duty under rule 6, not under rule 14, of statute 48, Geo. III, c. 55, as seven separate dwelling houses.—*Attorney General v. Mutual Tontine Westminster Chambers Association.* 35 L.T. 224; 24 W.R. 996.
- (ii.) **Ex. Div.—Income tax.**—Traders are not entitled, in making income tax returns, to deduct from profits for depreciation of buildings, plant or machinery.—*Forder v. Handyside*, L.R. 1 Ex.D. 333; 35 L.T. 62; 24 W.R. 764.
- (iii.) **Ex. Div.—Income Tax.**—The proper mode of assessment of the net profits of a fire insurance company under 5 & 6 Vict., c. 35, is to take the balance of total receipts over the total expenditure of a given year; any wrong done by losses in respect of premiums on which income tax has been assessed and paid, must be taken into account in the following year.—*Imperial Fire Insurance Company v. Wilson*, 35 L.T. 271.
- (iv.) **Ex. Div.—Income Tax.**—*Held* that two companies, the control of whose business was exercised by directors in London, were rightly assessed in respect of the whole of the gains of their businesses carried on in Italy and India respectively.—*Cesena Sulphur Company v. Nicholson—Calcutta Jute Mills Company v. Nicholson*, 35 L.T. 275.

Scotland, Law of:—

- (i.) **H. L.—Harbour—Beaching fishing boats—Local Act.**—The fishermen of a sea village had been from time immemorial accustomed to beach their boats in winter on land adjoining the harbour; the landowner obtained a local Act, authorising him to levy a toll. *Held* that he must not exclude the fishermen without substituting another beaching ground; a local Act must be judicially noticed.—*Aiton v. Stephen*, L.R. 1 App. 456.
- (ii.) **H. L.—Matrimonial Banns.**—Marriages in "facie ecclesie" must be preceded by proclamation of banns: in a "quoad sacra" parish the proclamation must be in the church of such parish; the ministers and elders of such parish enjoy the status, etc., of ministers and elders of the Church of Scotland.—*Hutton v. Harper*, L.R. 1, App. 464.

Settlement:—

- (i.) **Ch. Div. V. C. H.**—*After-acquired Property*.—*Held* that a covenant to settle after-acquired property of the wife included a contingent reversionary interest which could not fall into possession until both the husband and wife were dead without issue.—*Cornmell v. Keith*, 45 L.J. Ch. 689; 85 L.T. 29; 24 W.R. 683.
- (ii.) **Ch. Div. V. C. M.**—*After-acquired Property*.—A post-nuptial settlement contained a covenant to settle after-acquired property of wife. *Held* that an interest to which the wife was at the date of the settlement contingently entitled, and which fell into possession after her death, was included.—*Agar v. George*, L.R. 2, Ch. D. 706; 34 L.T. 487; 24 W.R. 696.
- (iii.) **Ch. Div. M. R.**—*After-acquired Property*.—A marriage settlement contained a covenant to settle after-acquired property. *Held* that a vested reversionary interest to which the wife was entitled at the date of the settlement, and which fell into possession after her death, was not included.—*Re Jones' Will*.—L.R. 2, Ch. D., 862; 45 L.J. Ch. 428; 35 L.T. 25; 24 W.R. 697.
- (iv.) **Ch. Div. V. C. B.**—*Confirmation*.—By marriage settlement it was provided that certain reversionary interests of the infant wife should be conveyed to the trustees; after the husband's death, in administration suit relating to property settled by the husband, a decree was made with consent of the widow for payment thereof to the trustees; the widow having married again, an order was made on petition by the second husband and his wife that her funds might be paid to account of the settlement made on the first marriage. *Held* that the settlement had been successively confirmed by the widow and the second husband.—*White v. Cox*, L.R. 2, Ch. D. 387; 45 L.J. Ch. 686; 34 L.T. 418.
- (v.) **Ch. Div. M. R.**—*Construction*—"Payable".—Trust, subject to life interests of parents, for children, being sons at 21, and being daughters at 21 or marriage, "the issue of any child whose parent should die before his or her share should become payable" to take parent's share: *Held* that as daughter's shares vested on marriage, "payable" could not mean vested, but must refer to period of distribution.—*Day v. Ratcliffe*, 24 W.R. 961.
- (vi.) **Ch. Div. M. R.**—*Construction*—*Power of sale*.—An ordinary power of sale and exchange in a settlement of an individual moiety of real property authorises a partition.—*Re Frith and Osborne*, 85 L.T. 146; 24 W.R. 1061.
- (vii.) **H. L.**—*Divorce*—*Election*.—A lady having an absolute reversionary interest under parents' marriage settlement, married while an infant; on coming of age a post-nuptial settlement of the reversionary interest, and of property of her husband and father was executed; the marriage was afterwards dissolved: *Held* that she was put to her election to take under or against the settlement.—*Codrington v. Codrington*, 45 L.J.Ch. 660; 84 L.T. 221; 24 W.R. 648.
- (viii.) **Ch. Div. M. R.**—*Divorce*—*Husband's interest*—*Re-marriage*.—A fund was settled in trust for wife if she should survive her husband, but if she should die in his lifetime, in trust for him for life or till re-marriage, and upon his decease or marriage, in trust for wife's next-of-kin; the marriage was dissolved; both parties married again, and the wife died: *Held* that the next-of-kin of the wife at her death were entitled, and that husband's interest was destroyed by his second marriage in his wife's lifetime.—*Re Matthew's trusts*, 24 W.R. 960.
- (ix.) **C. A.**—*Divorce*—*Husband's interest*.—Where decree for divorce had been made on petition of wife. *Held* that husband did not forfeit his life interest under his marriage settlement in his wife's property.—*Burton v. Sturgeon*, L.R. 2 Ch.D. 318; 45 L.J.Ch. 633; 84 L.T. 706; 24 W.R. 772.

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- (x.) **P. D. A. Div.—Divorce—Variation.**—*Held* that Court will not review order for variation of settlement on ground of matters arising subsequently, also that where a provision is ordered to be paid to wife out of funds settled by her, the restriction, "*dum casta et sola vixerit*," will not be imposed.—*Gladstone v. Gladstone*, 45 L.J.P.D. & A. 82; 24 W.R. 739.
- (xi.) **P. D. & A.—Divorce—Variation.**—*Held* that under the circumstances the marriage of the respondent and co-respondent after a divorce obtained by the petitioner did not preclude the Court from granting an application by the petitioner for variation of his marriage settlement.—*Benyon v. Benyon and O'Callaghan*, 24 W.R. 950.
- (xii.) **Ch. Div. V. C. M.—Mortgage—Arrears of interest.**—A. was under a settlement owner in fee of land subject to a mortgage and to a contingent charge created by the settlement in favour of B., the interest fell into arrear, and on a sale by the mortgagees they retained a sum in respect of the arrears. *Held* that the trustees of the settlement were entitled to claim against the estate of A. in respect of the sum retained by the mortgagees.—*Butcher v. Simmonds*, 35 L.T. 304; 24 W.R. 781.
- (xiii.) **Ch. Div. V. C. B.—Power—Improvements.**—By settlement trustees were directed to apply three-fourths of the income of settled real estates as capital which it was thereby provided should be invested in purchase of real estate to be held on the same trusts: *Held*, the income being insufficient, that trustees might apply part of the capital to permanent improvements, e.g., drainage and new farm buildings.—*Leslie's Trusts, Re*, L.R. 2 Ch.D. 185; 45 L.J. Ch. 668; 84 L.T. 239; 24 W.R. 546.
- (xiv.) **Ch. Div. M. R.—Satisfaction.**—By marriage settlement, in 1856, a fund was settled, subject to a power of appointment by deed or will given to C. W., in trust for C. W. for life to her separate use, and after her death in the event, which happened, of her surviving her husband, for herself absolutely; C. W. during coverture covenanted that her heirs, executors, or administrators, should pay £1,000 to the trustees of her daughter's marriage settlement to be held by them upon trusts therein mentioned; she subsequently by her will gave £1,000 upon trusts substantially similar. *Held* that the covenant of C. W. created a debt binding the property comprised in the settlement of 1856, also that the legacy was a satisfaction of the covenant, also that savings made by C. W. out of her separate property during coverture passed by the will.—*Mayd v. Field*, 45 L.J.Ch. 699; 84 L.T. 614; 24 W.R. 660.
- (xv.) **C.A.—Suit to set aside Mortgage.**—*Held* that a bill by a tenant for life and infant remainderman to set aside a mortgage of the settled property on ground of fraud and for execution of the trusts, must, on failure of the charges of fraud, be dismissed, with liberty for the tenant for life to apply at Chambers for account of income.—*Wade v. Broadhurst*, 84 L.T. 924.
- (xv.) **Ch. Div. V. C. H.—Voluntary Settlement—Confirmation by will.**—A. transferred a sum of consols to trustees upon trust to hold them, together with certain bank shares, mortgage debts, and furniture for herself for life with remainders over; the bank shares were never transferred, and the settlor received herself moneys payable in respect of some of the mortgages: A. by her will confirmed the settlement. *Held* that the settlement was of itself operative as regards the consols, furniture, and mortgage moneys received by the trustees, and by virtue of the confirmation by will, as regards the bank shares, but not as to the mortgage debts received by the settlor.—*Bissey v. Flight*, 24 W.R. 957.
- (xvi.) **Ch. Div. V. C. B.—Will—Re-building house.**—A. was under a will tenant for life of real estate with remainder to his infant son in tail; he was also under a deed entitled to life interest in a fund with remainder to the same son on attaining 21: *Held* that a sum might be allowed out of the fund, to be repaid by accumulations of the same fund, for the purpose of re-building the mansion house on the real estate.—*Donaldson v. Donaldson*, 84 L.T. 900; 24 W.R. 1087.

Ships:—

- (i.) **C. A.—Bill of lading.**—Where master signs bill of lading of goods "weight, contents, and value unknown," stating that the goods were shipped in good order and condition, if the goods arrive damaged, the onus of proof lies on the shipowner to free himself from liability.—*The Peter der Grosse*, 84 L.T. 749.
- (ii.) **Q. B. Div.—Bill of Lading.**—L. arranged to ship goods for plaintiff to sell on commission, drawing bills on plaintiff for the purchase, the documents of title being hypothecated to plaintiff to meet the bills. After shipment of a cargo L. failed, and his liquidator handed the bill of lading to defendants to whom plaintiff under protest paid value of cargo. *Held* that plaintiff had a good equitable title to the bill of lading and was entitled to recover the money paid by him and damages for detention of the bill of lading.—*Lutcher v. Comptoir, d'Escompte de Paris*, 84 L.T. 798.
- (iii.) **P. O.—Bill of lading—Conditions.**—By a bill of lading it was provided that goods should be "delivered from the ship's deck where the ship's responsibility shall cease, at the port of M., unto the G. Railway Company, and by them to be forwarded to T., and at the aforesaid station delivered to Messrs. M. & Co. . . . No damage that can be insured against will be paid for, nor will any claim whatever be admitted unless made before the goods are removed." *Held* that the removal referred to was from the railway at T., that the condition covered latent damage, and that under the circumstances plaintiff could not recover; also that the bill of lading, having been made in England by an English master, was a contract governed by English law.—*Moore v. Harris*, L.R. 1, App. 318; 84 L.T. 519; 24 W.B. 887.
- (iv.) **Q. B. Div.—Bill of Lading—Exception of Fire.**—*Held* that an exception in bill of lading of "fire on board" did not exempt the shipowners from contribution in general average in respect of injury to goods by water used to extinguish a fire.—*Schmidt v. Royal Mail Steamship Company*, 45 L.J. Q.B. 648.
- (v.) **P. D. & A. D.—Carrier.**—When there is unreasonable delay in delivery of goods through negligence of carrier by sea, the owner or assignee of the bill of lading is entitled to recover as damages the difference between the market price at the time when the goods arrived and at the time when they ought to have arrived.—*The Parana*, 85 L.T. 32.
- (vi.) **C. A.—Carrier.**—A carrier does not insure against an act of nature which is irresistible, i.e., not preventible by reasonable precaution, nor against defects in the thing carried; a shipowner is not, like a common carrier, liable as an insurer of goods bailed to him for carriage. Decision of C.P. Div. (L.R. 1, C.P.D. 19; 45 L.J. C.P. 19; 83 L.T. 731; 24 W.R. 237) overruled.—*Nugent v. Smith*, L.R. 1, C.P.D. 428; 45 L.J. C.P. 697; 84 L.T. 827.
- (vii.) **C. P. Div.—Charter-party.**—B. & Co. tendered to captain of a foreign ship a charter-party not containing provision for detention in loading; on captain's refusal, B. & Co. obtained from defendant (who had no notice of the charter) an undertaking to load in ten working days, signed "on account of the Bebside Colliery," whereupon the captain accepted the charters. *Held* upon the facts that there was a valid contract between the captain and the defendant personally not as agent.—*Weidner v. Hoggett*, L.R. 1, C.P.D. 533.
- (viii.) **Q. B. Div.—Charter-party.**—Plaintiff chartered a ship from defendant for 12 months "after her present voyage;" on completion of the voyage, she was detained as unseaworthy by the Board of Trade, but was repaired, and tendered to plaintiff about 3 months after the time stipulated. *Held* that plaintiff was entitled to rescind the contract.—*Tully v. Howling*, 45 L.J. Q.B. 756; 24 W.R. 845.

- (ix.) **Q. B. Div.—Charter-party.**—A cargo was shipped to T. in Sea of Asof, or so near thereto as the ship could safely get; freight to be paid in London against certificate of right delivery of cargo; the sea being blocked with ice till ensuing spring captain discharged cargo at 80 miles distance from T. *Held* under the circumstances of the case, that delivery was not within the terms of the charter party and the shipholder was not entitled to the freight.—*Metcalf v. Britannia Ironworks Co.*, L.R. 1, Q.B.D. 618.
- (x.) **C. P. Div.—Charter-party—Demurrage.**—The arrival of a ship, from which time demurrage begins, must be dated according to the custom of the port, with regard to which evidence is admissible.—*Steamship Company "Norden" v. Dempsey*, 24 W.R. 984.
- (xi.) **Ex. Div.—Charter-party—Demurrage.**—Charter party provided that plaintiffs' ship should "load in regular turn" a cargo to be supplied by defendants: through their default one turn was lost, and ship was detained by harbour-master because of storms: *Held* that plaintiff was entitled to demurrage in respect of such detention.—*Jones v. Adamson*, L.R. 1, Ex. D. 60; L.J. 45, Ex. 64; 35 L.T. 287.
- (xii.) **H. L.—Charter-party—Insurance.**—*Held* that charter-party may provide for prepayment of part of freight, and in such case the remainder may be subject of insurance by the shipowner.—*Allison v. Bristol Marine Insurance Co.*, L.R. 1, App. 209; 34 L.T. 809; 24 W.R. 1037.
- (xiii.) **P. D. & A. D.—Collision—Limitation of liability.**—In a cause of damage a vessel was released from arrest on payment into court of amount of her owner's liability as limited by statute; the vessel was subsequently pronounced solely to blame, and this decision was confirmed on appeal. The Court decreed limitation of limitation of liability, but did not order the amount in court to be transferred to the limitation of liability suit.—*The Sisters*, L.R. 1 P.D. 281; 35 L.T. 36.
- (xiv.) **P. D. & A. Div.—Collision—Lis alibi pendens.**—The *Cattarina Chiazaro* was arrested in Ireland in a cause of damage arising from a collision, but was released on bail and came to England, and was again arrested in an action in rem commenced with regard to the same collision: the Court ordered release of the ship and stay of proceedings.—*The Cattarina Chiazaro*, L.R. 1, P.D. 568.
- (xv.) **C. A.—Collision—Negligence.**—A steamer, with sails, running through a roadstead, ought at all times to have a look-out, besides the captain on the bridge.—*The Glannibanta, The Transit*, L.R. 1, P.D. 283; 34 L.T. 984; 24 W.R. 1033.
- (xvi.) **C. A.—Collision—Negligence—Speed—Light.**—A steamer must not run at full speed on a dark night near the coast: a vessel is not generally bound to show a light to a vessel following her.—*The City of Brooklyn*, L.R. 1, P.D. 276; 34 L.T. 932; 24 W.R. 1056.
- (xvii.) **C. A.—Damage to pier.**—A shipowner is not liable under the Harbours, Docks, and Piers' Clauses Act, 1847, s. 74, for damage to a pier caused by a wrecked and abandoned vessel being driven against it by stress of weather.—*River Wear Commissioners v. Adamson*, L.R. 1, Q.B.D. 546; 35 L.T. 118; 24 W.R. 872.
- (xviii.) **C. P. Div.—Detention for unseaworthiness.**—Neither the complaint to Board of Trade under Merchant Shipping Act, 1873, nor the Surveyor's report as to condition of ship, need state that she cannot proceed to sea without danger to life: it is sufficient if this fact can be reasonably inferred.—*Lewis v. Gray*, L.R. 1, C.P.D. 462; 45 L.J. C.P. 720; 34 L.T. 421.
- (xix.) **C. P. Div.—Master—Dismissal—Contract.**—A master mariner accepted command of a ship under a written contract of hiring to effect that salary should be at the rate of £180 per annum, to cease on the day he should

be required to give up command: *Held* that he could not be dismissed without reasonable notice.—*Green v. Wright*, L.R. 1, O.P.D. 591.

- (xx.) C. A.—*Necessaries*.—The master of a foreign vessel at Quebec obtained money for necessaries for his ship by a Bill of Exchange drawn upon ship-brokers in London, the bill having been accepted and paid: *Held* that the Court had jurisdiction to entertain an action by the acceptors against the ship for the amount.—*The Anna*, L.R. 1, P.D. 253; 34 L.T. 895.
- (xxi.) P.D. & A. Div.—*Pleading*.—Where defendant admits liability, a claim for limitation thereof under Merchant Shipping Act, 1862 (25 & 26 Vic. c. 63.) s. 54, may be made by counterclaim instead of by separate limitation of liability suit.—*The Clutha*, 35 L.T. 86.
- (xxii.) P.D. & A. Div.—*Salvage—Inequitable Agreements*.—A wrecked crew having taken refuge on a rock, were in imminent danger; in answer to signals of distress, a steamship of plaintiff's came up, and the master refused to rescue the crew for less than £4000, and an agreement to that effect was signed by the master of the wrecked ship: the Court set aside the agreement as inequitable, and awarded £1,800.—*The Medina*, L.R. 1, P.D. 272; 45 L.J. P.D. & A. 81; 34 L.T. 918.
- (xxiii.) P. D. & A.—*Salvage*.—In cases of life salvage, cargo separately salvaged is liable under Merchant Shipping Act, 1854, s. 458, to contribute to reward of life salvors.—*Cargo ex Schiller*, 35 L.T. 97.
- (xxiv.) C. A.—*Salvage—Queen's Ship*.—The commander and crew of a Queen's ship are entitled to remuneration for salvage, but not to impose terms; *quere*, whether they can enter into an agreement with the master of a wrecked ship as to amount of salvage. A Bombay Government ship is in these respects on the same footing as a Queen's ship.—*Cargo ex Woosung*, L.R. 1, P.D. 260; 35 L.T. 8.
- (xxv.) P. D & A. Div.—*Wages and disbursement*.—Master of a ship, in order to prevent arrest and detention of ship, gave a bond in respect of a collision caused by his negligence, in an action of wages and disbursement brought by him against the vessel: *Held* that the amount of the penalty must be retained in court to answer any claim against the master under the bond.—*The Limerick*, L.R. 1 P.D. 292.

Solicitor :—

- (i.) Ch. Div. M. R.—*Articled Clerk*.—Where a clerk, articled for three years, after having served 21 months, was absent from illness for 16 months, and afterwards served 13 months more: *Held* that he would not be examined, but must enter into fresh articles for six months.—*Ex parte Digby*, 45 L.J.Ch. 692.
- (ii.) Q. B. Div.—*Costs*.—33 & 34 Vic., c. 28, s. 4.—An agreement for a fixed sum as costs under Attorney and Solicitors' Act, 1870, s. 4, must be in writing and signed by solicitor and client.—*Regina v. Munro, Re Lewis*, 24 W.R. 1017.
- (iii.) P. D. & A. Div.—*Proctor*.—Appearances in the Arches Court must be entered by solicitors, who are also proctors of the Arches, duly qualified and admitted.—*Crisp v. Martin*, L.R. 1 P.D. 302.

Telegraph :—

- (i.) Q. B. D.—*Purchase by Government—Compensation*.—In calculating the compensation to be paid under the Telegraph Act, 1868 (31 and 32 Vic., c. 110), s. 8, sub-sec. 7, to officers of an undertaking purchased by Government, fixed allowance for travelling expenses must be taken into consideration.—*Regina v. Postmaster General*, 45 L.J.Q.B. 609; 35 L.T. 241.
- (ii.) Q. B. Div.—*Purchase by Government—Compensation*.—The S. & D. Railway Co. undertook to complete their works, including telegraphs, and to lease their line to the S. W. Railway Co., who agreed to pay them a

percentage on gross receipts from traffic: *Held* that by this agreement the S. & D. Co. had parted with their "beneficial interest" in the telegraphs, and were not entitled to compensation under the Telegraph Acts.—*Regina v Lord Coleridge*, 45 L.J. Q.B. 649; 34 L.T. 752.

Title:—

- (i.) **Ch. Div. V. C. B.**—*Adverse Possession*.—By a private Act of Parliament in 1833, proposed streets, roads, and squares delineated on a plan were vested in Commissioners with full powers of lighting, paving, &c.: several plots of land described on the plan, and on which streets, &c., were delineated, had previously been sold to A., who continued to occupy the same till 1867 as arable land, when the Commissioners gave him notice of their intention to take possession of the streets, &c.: *Held* that A. was entitled to an injunction to restrain them from so doing.—*Mackett v. Herne Bay Commissioners*, 35 L.T. 202.

Trade Mark:—

- (i.) **C. A.**—*Infringement*.—Injunction refused to restrain defendant from advertising his machines as "Singer" machines, his advertisements always stating that the machines sold by him were manufactured by himself, and the word "Singer" not being placed upon the machines.—*Singer Manufacturing Co. v. Wilson*, L.R. 2, Ch. D. 434; 45 L.J. Ch. 490; 34 L.T. 858; 24 W.R. 1023.
- (ii.) **Ch. Div. M. R.**—*Interim injunction*.—Where it was not proved that manufacturer had contracted to supply cigars of a particular brand exclusively to plaintiff, an injunction was refused to restrain manufacturer's London agent from selling cigars under same label as plaintiff.—*Hirsch v. Jones*, 45 L.J. Ch. 864; 35 L.T. 228.
- (iii.) **Ch. Div. M. R.**—*Registration*—88 & 89 Vict., c. 91.—A mere word cannot be registered under the Trade Marks Registration Act, 1875.—*Re Stephens*, 24 W.R. 963.
- (iv.) **Ch. Div. V. C. H.**—*Registration*—88 & 89 Vict., c. 91.—The Court has no power to interfere with the direction of the Commissioners of Patents as to advertisements, nor to order insertion of a name on the registry without advertisement.—*Re Meikle's application*, 24 W.R. 1067.

Trustee:—

- (i.) **Ch. Div. V. C. H.**—*Appointment*.—A petition for appointment of a new trustee in place of one of unsound mind not so found and not asking for a vesting order need not be presented "in lunacy."—*Re Vicker's trusts*, L.R. 3, Ch. D. 112; 24 W.R. 755.
- (ii.) **C. A.**—*Leaseholds—Vesting order*.—On appointment of trustees after the death of surviving trustee of leaseholds, there being no legal personal representative, the Court has power under Trustee Act, 1850, s. 34, to make a vesting order.—*Dalgleish's Trusts* (L.R. 1, Ch. D. 46; 45 L.J. Ch. 68; 24 W.R. 58) dissented from.—*Re Rathbone*, L.R. 2, Ch. D. 483; 45 L.J. Ch. 581; 24 W.R. 566.

Vendor and Purchaser:—

- (i.) **C. A.**—*Copyholds*.—On sale of copyholds, the vendors contracted to give such title as they possessed to extend over 20 years, the purchaser to prepare conveyance and surrender at his own expense: the vendors had only a complete equitable title. *Held* that the purchaser was entitled to a surrender of the legal estate, all necessary fines to be paid by vendors. *Whitely v. Taylor*, 35 L.T. 187.
- (ii.) **Q. B. Div.**—*Estoppel*.—Plaintiff paid deposit in respect of a purchase of leasehold premises under an agreement signed by the auctioneer on behalf of the "vendor." Plaintiff received abstract of title and made requisitions thereon, but afterwards declined to complete, on the ground that the

contract was void for insufficient description of parties. *Held* that plaintiff was estopped from recovering the deposit.—*Thomas v. Brown*, 85 L.T. 287.

- (iii.) **Ch. Div. V. C. H.—Specific Performance—Mistake.**—Where the purchaser of a piece of land after acceptance of vendor's title under a special contract precluding enquiry discovered aliunde that the land was his own property: *Held* that completion of the purchase could not be enforced.—*Jones v. Clifford*, 24 W.R. 979.

Wager:—

- (i.) **C. A.—H. & B.** deposited £50 each with N., and agreed that £100 should be paid to H. if his horse trotted 18 miles within an hour, if not then to B. The horse having trotted the distance within the time, *Held* that B. was entitled to demand back his money from N., the transaction being not a contribution towards a prize within 8 & 9 Vict., c. 109, s. 18, but a simple wager.—*Batson v. Newman*, L.R. 1, O.P.D. 578.

Water:—

- (i.) **Ch. Div. V. C. M.—Monopoly**—The R. Waterworks Co. empowered by Act of Parliament exclusively to supply R. transferred their property to the S. Co. and ceased to act. *Held* that the R. Co. though existing was not "able and willing" within Public Health Act, 1875, s. 52, and the S. Co. was not entitled to supply water, and that neither Co. could claim monopoly under the Act.—*Richmond Waterworks Co. v. Vestry of Richmond*, L.R. 8, Ch. D. 82 45 L.J. Ch. 441; 84 L.T. 481.
- (ii.) **App. Div. Ct.—Navigation Acts.**—*Held* that a tanner who threw rubbish into a brook four miles from its junction with the river Aire, could not be convicted of breach of the Aire and Calder Navigation Act (14 Geo. III., c. 96), s. 97.—*Smith v. Barnham*, 84 L.T. 774.
- (iii.) **H. L.—Riparian owners.**—A canal company with statutory power to purchase and hold land may restrain such extraordinary and unreasonable user by upper riparian owner of stream flowing through land so held by them as would interfere with the supply of water to the canal, or their rights as riparian owners, and that diverting water for supply of neighbouring town was extraordinary and unreasonable user.—*Swindon Waterworks Co. v. Berks Canal Co.*, 45 L.J. Ch. 688; 83 L.T. 513; 24 W.R. 284.

Will:—

- (i.) **Ch. Div.—Accumulation.**—Testator bequeathed £12,000 upon trust to purchase an advowson to which trustees should nominate whom they should think proper: subject to this trust the advowson was to be in trust for A. till he should have a benefice worth £1,000 per annum, or die: until the purchase the fund was to accumulate for twenty-one years, or till he should have a benefice of £1,000 per annum, or die, and then the whole or such part as should not have been applied, was to belong to A. absolutely: *Held* that A. was not entitled to immediate transfer of the fund.—*Gott v. Nairne*, 35 L.T. 209.
- (ii.) **C. A.—Annuity—Abatement.**—Testatrix gave life annuities, and directed a fund to be set apart to answer them; she bequeathed her residue, including the fund, "when and so soon as such annuities shall respectively cease" to J.; the estate was insufficient, and the legacies and annuity fund were apportioned by the Court on the death of one of the annuitants. *Held*, that J. could take nothing till payment in full of the legacies and annuities.—*Re Tootal's estate*, L.R. 2 Ch.D. 628; 24 W.R. 1031.
- (iii.) **Ch. Div. V. C. H.—Annuity—Arrears.**—Testator charged annuity on lands in Jamaica, the lands being deteriorated and yielding no income, arrears of large amount were owing to the annuitant at her death: *Held* that the first receipts of the lands were payable to the representatives of the annuitants; the Statute of Limitations does not apply to Jamaica.—*Pitt v. Lord Dacre*, 24 W.R. 948.

- (iv.) **Ch. Div. M. R.—Annuity—Arrears.**—Arrears of an annuity whether charged on corpus or income do not carry interest.—*Wheatley v. Davis*, 85 L.T. 806; 24 W.R. 818.
- (v.) **Ch. Div. V. C. M.—Annuity—Dower.**—An annuity bequeathed to widow "in satisfaction of dower" is not entitled to priority unless testator leaves land subject to dower.—*Roper v. Roper*, 85 L.T. 155; 24 W.R. 1018.
- (vi.) **Ch. Div. V. C. H.—Assets.**—Where general personality is insufficient for payment of debts, pecuniary legacies must be resorted to before residuary realty.—*Farquharson v. Floyer*, L.R. 3 Ch.D. 109.
- (vii.) **Ch. Div. V. C. M.—Attesting witness.**—Testator devised real estate to A. for life with remainder to her children; her husband attested the will: *Held*, that the failure of the gift to A. accelerated the gift in remainder.—*Jull v. Jacobs*, 85 L.T. 153; 24 W.R. 947.
- (viii.) **H. L.—Charge of debts.**—A devisee of an estate charged with payment of debts who is also an executor, can make a good title to a purchaser or mortgagee who is not bound over to the application of the purchase money.—*Corser v. Cartwright*, 45 L.J.Ch. 605.
- (ix.) **Ch. Div. M. R.—Charge of Legacies.**—Testatrix directed payment of her debts and legacies by her executors, and, after giving certain legacies and devising certain real estate, gave the residue of her real and personal estate to A. & B. upon trust to sell, and appointed A. & B. executors: *Held* that the legacies were charged on the real estate.—*Greville v. Brown* (7 H.L.C. 689, 7 W.R. 678.) followed. *Re Brookes Estate*, *Brooke v. Rooke*, 85 L.T. 301; 24 W.R. 959.
- (x.) **P. C.—Charitable Bequest.**—Testator left an annual sum to be applied to discharge and relief of poor debtors in prison at Calcutta, and bequeathed the residue of his property to charitable institutions at Calcutta, Lucknow, and Lyons. On the abolition of imprisonment for debt, a scheme was drawn up for devoting the accumulated capital for the benefit of the institutions at Calcutta and Lucknow to the exclusion of Lyons: *Held* that the scheme contained a proper *cypres* application of the fund.—*Mayor of Lyons v. Advocate-General of Bengal*, L.R. 1, App. 91; 45 L.J.P.O. 17; 84 L.T. 77; 24 W.R. 679.
- (xi.) **H. L.—Codicil.**—Testator devised freeholds upon certain uses, and copyholds and leaseholds upon corresponding trusts; by codicil he altered uses of freeholds, but did not mention copyholds or leaseholds: *Held* (affirming decision of Wickens, V.C.) that copyholds and leaseholds passed according to trusts of will.—*Martineau v. Briggs*, 45 L.J.Ch. 674; L.T. 98, N.S. 283; 28 W.R.
- (xii.) **Ch. Div. V. C. B.—Construction—"Appurtenances."**—Testator devised and bequeathed an indigo factory in India with the appurtenances; there were certain outstandings consisting of loans to native landowners for purposes of indigo cultivation necessary to the business. Testator was indebted to a Hindoo banker for an advance bearing 12 per cent. interest, which debt was barred by the Indian Statute of Limitations. *Held* first that the "outstandings" did not pass by the gift of the factory; secondly, that the banker's claim not being barred by the English Statute of Limitations, must be allowed with interest at £4 per cent.—*Finch v. Finch*, 35 L.T. 236.
- (xiii.) **Ch. Div. V. C. B.—Construction—Cumulative gift.**—Testator executed his will in duplicate; by each of two different codicils similarly worded, but executed at different times, he gave a legacy of £2,000 to H.; one of the codicils was attached to each copy of the will. *Held* that evidence was admissible to show that the gift was not intended to be cumulative. *Hubbard v. Alexander*, 35 L.T. 52; 24 W.R. 1058.
- (xiv.) **Ch. Div. M. R.—Construction—"family."**—In a will the word "family," unless controlled by the context, only includes children.—*Pigg v. Clarke*, 24 W.R. 1014.

- (xv.) **H. L.**—*Construction—Illegitimate children.*—Testator, by his will, gave real and personal estate to his wife for life, and after her death, subject to appointment to her among children to be divided "equally between his children by her"—there were two illegitimate children, but none born after the marriage. *Held* that subject to life interest of wife, estate was undisposed of.—*Dorin v. Dorin*, L.R. 7; H.L. (E. & I.) 568; 88 L.T. 281; 45 L.J. Ch. 652.
- (xvi.) **Ch. Div. M. R.**—*Construction—"Legal Representatives."*—Gift of income of a fund to A., B., C., & D., for their respective lives, and after their death, of the principal to the legal representatives of A., B., C., and D., to be equally divided among them. *Held* that the principal went in fourths to the executors and administrators of A., B., C., and D., respectively.—*Wing v. Wing*, 84 L.T. 941; 24 W.R. 878.
- (xvii.) **H. L.**—*Construction—"Railway Shares."*—A bequest of railway shares will include railway stock.—*Morrice v. Aylmer*, 45 L.J. Ch. 614; 84 L.T. 218; 24 W.R. 507.
- (xviii.) **Ch. Div. V. C. B.**—*Construction—"Real estate."*—A, devised all his real estate at E. and W. upon certain trusts, he had real estate and leaseholds at E., and leaseholds only at W.: *Held*, that all the leaseholds passed by the devise.—*Moose v. White*, 24 W.R. 1088.
- (xix.) **C. A.**—*Construction—"Survivors."*—Gift in trust for his three children for life, and on death of any of them without leaving issue, for the benefit of the survivors or survivor for life, and of the survivor's issue; only one of the three who was not the survivor left issue: *Held*, on construction of the will, that his issue was on death of the last survivor entitled to the whole fund.—*Wake v. Varah*, L.R. 2 Ch.D. 884; 45 L.J.Ch. 588; 84 L.T. 487; 24 W.R. 621.
- (xx.) **Ch. Div. M. R.**—*Construction—Survivor.*—Devise to trustees in trust for A., B., C., and D., for life as tenants in common, and on death of any of these for her children, and if any should die without issue, the share or shares of her or them so dying to go to the survivors or survivor in fee. *Held*, on the construction of the will, that cross-remainders were to be implied, and that "survivor" was not to be read "other."—*Maden v. Taylor*, 45 L.J. 569.
- (xxi.) **H. L.**—*Construction—Trust or power for sale.*—Testator left property to trustees upon trust, "after death of my wife (or during her life if she and the majority of my children and my trustees shall think it proper and expedient to do so) at the sole discretion of my trustees or trustee to sell, etc.;" the will also provided that in case "it shall be agreed or my trustees shall decide to sell," his sons should have right of pre-emption. *Held* that the will created absolute trust for sale, and the discretion only applied to the time and power of sale.—*Minors v. Battison*, L.R. 1 App. 428; 85 L.T. 1.
- (xxii.) **Ch. Div. M. R.**—*Construction—Vesting.*—Upon the construction of a will giving testator's general residue to his children and issue, sons, or grandsons' shares to "vest" at 24, and daughters, or granddaughters' shares to be settled as therein mentioned, it was held that the gift to children and issue was a gift to a class, that "vested" must be taken in its proper sense, and that the whole gift was void for remoteness.—*Hale v. Hale*, 24 W.R. 1065.
- (xxiii.) **C. A.**—*Leaseholds—Trust for Renewal.*—Leaseholds, the reversion of which became vested in the Ecclesiastical Commissioners, were settled by will subject to a trust for renewal out of the rents and profits, or by mortgage in trust for A. for life, with remainders over: the Commissioners ultimately refused to grant further renewals: *Held* that the accumulated renewal fund must be treated as capital.—*Maddy v. Hale*, 85 L.T. 184; 24 W.R. 1005.

C

- (xxiv.) **Ch. Div. M. R.** *Devise of Trust Estates.* Testator contracted to sell land, but died before completion; by his will he devised all his real estate to H. & M. on trust for sale, and all real estate vested in him as trustee to H.: *Held* that the legal estate in the land contracted to be sold, passed to H.—*Lysaght v. Edwards*, L.R. 2, Ch. D. 499; 45 L.J. Ch. 554; 84 L.T. 787; 24 W.R. 778.
- (xxv.) **Ch. Div. M. R.**—*Election.*—J. took certain benefits under will of W., whereby he devised to R. cottages belonging to J., who sold the cottages and died. *Held* that R. was entitled to compensation out of J.'s estate limited to the benefits received by J. under the will.—*Rogers v. Williams*, 24 W.R. 1039.
- (xxvi.) **Ch. Div. V. C. M.**—*Executor.*—An executor who has not proved but has received assets, and a person who has without authority intermeddled with testator's assets, may respectively be sued by a creditor in respect of the assets they have respectively received.—*Ambler v. Linday*, 85 L.T. 93; 24 W.R. 982.
- (xxvii.) **Q. B. Div.**—*Executory devise.*—Devise in 1811 of land to A. and his heirs, and if A. left no issue then to B. and her heirs, and if B. left no issue then to the children of C., to be equally divided among them, share and share alike. A. took the estate and died without issue; then B. took and also died without issue; at B.'s death one child of C. was living but afterwards died. *Held* that on death of A., B. took in fee, subject only to life interest of surviving child of C.—*Gatenby v. Morgan*, 45 L.J. Q.B. 597; 85 L.T. 245.
- (xxviii.) **O. A.**—*Executory devise.*—Testator devised his real estate to trustees in trust to accumulate surplus rents and profits for twenty-one years, and then in trust for the first and other sons of T. in tail male, remainder for the second and every other younger son of W. in tail male, remainder to the first and every other son of H. in tail male, with remainder over: at the expiration of the twenty-one years, T. was dead without issue, W. and H. were living, each having one son only: *Held* that from the expiration of the term, until it should be ascertained whether or not a second son of W. should be born, the rents and profits were not disposed of, and went to the heir-at-law.—*Wade Gery v. Handley*, 45 L.J. Ch. 712; 85 L.T. 85.
- (xxix.) **O. A.**—*Gift to class.*—Bequest to A. in trust for life and on her death to apply income of fund for maintenance of children of testator then living and issue of children then dead, until youngest child should attain 21, and then in trust for children then living and issue then living of children dying before that period. *Held* that class must be ascertained at death of A., and that representatives of a child who had died in her lifetime without issue did not take.—*Re Deighton's settled estates*, L.R. 2, Ch. D. 788; 85 L.T. 81.
- (xxx.) **O. A.**—*Gift to Class.*—Bequest of fund in trust for M. for life, and afterwards to be equally divided among daughters of S. at 21, or marriage with consent of parents, after death of M., the husband of S. being dead, one of the daughters married while under age with consent of S.: *Held* that the class must be ascertained so soon as a daughter became absolutely entitled to share, also (reversing decision of M. R.) that daughter who married with consent of surviving parent took vested interest in the fund.—*Dawson v. Oliver Massey*, L.R. 1, Ch. D. 758; 45 L.J. Ch. 519; 45 L.J. Ch. 519; 24 W.R. 998.
- (xxxi.) **Ch. Div. V. C. H.**—*Gift to Class.*—Bequest to "each of the three children of my niece:" the niece had then three children born: another was born six months afterwards, and four months after testatrix's death: *Held* that the child *en ventre sa mere* did not take.—*Re Emery's Estate*. *Jones v. Ratcliff*, 84 L.T. 846; 24 W.R. 917.

- (xxxii.) **Ch. Div. V. C. B.**—*Gift to Class—Construction.*—Held upon construction of a will where there was a gift to a class, and the issue of such class, that the gift was substantial not original, and that the issue of a member of the class dead at the date of the will were not entitled to take.—*West v. Orr*, 35 L.T. 51.
- (xxxiii.) **Ch. Div. V. C. H.**—*Heirlooms.*—Held, that in a bequest of furniture, etc., in a mansion as heirlooms was included furniture removed from the mansion and stored, and also furniture purchased for the mansion but not placed there at testator's death.—*Rawlinson v. Rawlinson*, 84 L.T. 848; 24 W.R. 948.
- (xxxiv.) **Ch. Div. M. R.**—*Heirlooms.*—On application of tenant for life, the sale of heirlooms, apart from the land to which they were attached, was ordered for the purpose of paying off mortgages, the court being satisfied that such sale was for the benefit of parties interested, including infant remainder-man.—*Fane v. Fane*, L.R. 2, Ch.D. 711.
- (xxxv.) **Ch. Div. M. R.**—*Incorporation of documents.*—Testator by his will referred his trustees for information to a page in his ledger, which was not afterwards admitted to probate, the entries were not in all cases correct: Held that the entries must be regarded as incorporated in, and conclusive for the purposes of the will.—*Quithampton v. Going*, 24 W.R. 917.
- (xxxvi.) **Ch. Div. M. R.**—*Management Clause.*—Trustees having extensive powers of management during minorities of cestuis que trustent deposited title deeds with a bank to secure advances of money to be laid out in buildings under the power. Held that the trustees had no power to make such a mortgage.—*Broom v. Sheffield and Rotherham Bank*, 24 W.R. 948.
- (xxxvii.) **H.L.**—*Residue—Executor.*—The effect of 11 Geo. IV. & 1 Will. IV. c. 40, is simply that executors shall not take the residue by implication of law, but does not apply where there is an express gift of residue to an executor.—*Williams v. Arkle*, 45 L.J. Ch. 590; 33 L.T. 187; 24 W.R. 215.
- (xxxviii.) **Ch. Div. V. C. M.**—*Residue—Legal estate.*—Held that devise of "all the rest and residue of my unsettled estate" accompanied by charge of debts and legacies thereon passed legal estate in lands of which testator was trustee.—*Re Brown and Sibley*, 85 L.T. 305; 24 W.R. 782.
- (xxxix.) **C. A.**—*Revocation of devise.*—Testator in 1826 devised land to "E. his heirs and assigns," but subsequently struck out the words and wrote E. above the erased words. Held that there was an obliteration of the devise or clause within the Statute of Frauds, s. 60, so as to amount to a revocation of the devise in fee and that E. took an estate for life only.—*Swinton v. Bailey*, L.R. 1, Ex. D., 11; 35 L.T. 118; 24 W.R. 561.
- (xl.) **Ch. Div. V. C. H.**—*Satisfaction.*—Testator bequeathed to his wife and son £1,500, as to £1,000 upon trust for his daughter E. for life, with remainder to her children, and as to £500 for his daughter A. for life, with remainder to her children: the son survived the widow, and never set apart the fund, but during his life paid to E. & A. the income of their respective shares; by his will he bequeathed £1,000 to E. and £500 to A.: Held that these bequests were not in satisfaction of this debt as trustee.—*Fairer v. Park*, 35 L.T. 28.

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By L. G. GORDON ROBBINS, Barrister-at-Law.

Administration:—

- (viii.) **P. D. & A. Div.**—*Bond—Penalty.*—Where limited administration was granted for assignment of legal estate in leaseholds sold by trustees, the Court allowed the administrator's bond to be in a nominal penalty.—*In the goods of Bowlby*, L.J. 45 P.D.A. 100.
- (ix.) **Ch. Div. M. R.**—*Contingent interest.*—Members of a class which will only become entitled to a beneficial interest in a testator's estate contingently on the happening of a future event, cannot maintain an action for administration.—*Clowes v. Hilliard*, 25 W.R. 224.
- (x.) **Ch. Div. M. R.**—*Executors' accounts—Mistake—Costs.*—Where executors were found to have made a wrong partial distribution and their accounts were incorrect, costs of subsequent administration suit were charged on the whole estate as if no distribution had taken place, so as to make the executors liable in respect of the distributed shares.—*Hilliard v. Fulford*, L.J. 46, Ch. 43; 35 L.T. 750; 25 W.R. 161.
- (xi.) **Ch. Div. V. C. B.**—*Injunction—Irish suit.*—Pursuant to decree for account of testator's debts, and for inquiry as to encumbrances on his real estate, usual advertisements were issued; P. thereupon claimed specific performance of agreement for lease of lands in Ireland; the executors did not dispute the agreement; injunction granted to restrain P. from prosecuting suit commenced by him in Ireland.—*Eustace v. Lloyd*, 25 W.R. 211.
- (xii.) **P. D. & A. Div.**—*Letters of Administration—Chancery action.*—Where defendant in a Chancery action applied for grant of administration, with a view to wind up such action: *Held* that affidavit of consent of parties interested, and also certificate of the judge before whom the action was pending, were necessary.—*In the goods of Richardson*, 35 L.T. 767.
- (xiii.) **P. D. & A. Div.**—*Letters of Administration—"Special circumstances."*—Administration was granted to the sister of intestate, whose mother was of advanced age and in precarious health.—*In the goods of Clarke*, 25 W.R. 82.

Agreements and Contracts :—

- (xiii.) **C. P. Div.**—*Construction*.—A contract provided for completion of works within specified time with power for defendant's engineer to order alterations in plans and that, if contractors shall fail to proceed as required by engineer, defendants might avoid the contract. *Held* that avoidance could not be enforced after extension of time had been granted for completion of works.—*Walker v. London and North-Western Rail. Co.*, L.J. 45 C.P. 787; 25 W.R. 10.
- (xiv.) **C. A.**—*Construction*—"Cargo".—Contract by plaintiffs to sell and defendants to purchase "a cargo of from 2500 to 3000 barrels, sellers' option," of petroleum of a certain brand: plaintiffs chartered a ship, and finding 3000 barrels did not constitute a full cargo, shipped also 300 barrels of petroleum of a different brand: they offered to deliver to defendants 2700 or 3000 barrels, retaining the 300 for themselves: Defendants refused to receive any petroleum: *Held* that defendants were not by the terms of the contract bound to accept part of a cargo, and plaintiffs could not maintain action.—*Borrowman v. Drayton*, 35 L.T. 727; 25 W.R. 194.
- (xv.) **Ex. Div.**—*Contract of Sale*—*Non-acceptance*—*Measure of Damages*.—Plaintiffs agreed to sell and defendants to take a supply of coal at per ton to be delivered in monthly instalments at the pit's mouth: the defendants failed to accept and remove the instalments: the coal was of a perishable kind, deteriorating if stacked: *Held*, under the circumstances of the case, that the measure of damages was the difference between the amount of cost of raising the coal added to value of the unraised coal (to be ascertained by a competent person without raising and selling it), and the contract price.—*Silkstone and Dodsworth Coal and Iron Co. v. Joint Stock Coal Co.*, 35 L.T. 668.
- (xvi.) **C. A.**—*Specific Performance*—*Withdrawal of Offer*.—Defendant gave to plaintiff a memorandum of agreement for sale of land with postscript, "This offer to be left over till Friday, 9 o'clock a.m." On Thursday defendant contracted to sell the property to A.: on Friday, before 9 o'clock, plaintiff gave to defendant a written acceptance of the offer to him: *Held* that plaintiff could not enforce specific performance.—*Dickinson v. Dodds*, L.R. 2, Ch.D. 463; L.J. 45, Ch. 777; 34 L.T. 607; 24 W.R. 594.
- (xvii.) **Q. B. Div.**—*Statute of Frauds*—*Fixtures*.—No memorandum is necessary under Statute of Frauds for sale of fixtures, as being neither an interest in land under s. 4, nor goods and chattels under s. 17.—*Lee v. Gaskell*, L.J. 45, Q.B. 540; 34 L.T. 750; 24 W.R. 824.
- (xviii.) **Ch. Div. V. C. M.**—*Statute of Frauds*—*Part Performance*.—A father on daughter's marriage verbally promised to give her a house, and subsequently put her and her husband in possession: the father paid instalments of a charge in favour of a building society as they became due; at his death a balance of £110 was still owing: *Held* that the possession was sufficient part performance to take agreement out of Statute of Frauds, and the £110 was payable out of the father's estate.—*Ungley v. Ungley*, L.R. 4, Ch.D. 73; 35 L.T. 619; 25 W.R. 39.

Assault.—

- (i.) **Ex. Div.**—*Conviction a bar to action*—"Same cause".—Where defendant had been convicted under 24 and 25 Vict., c. 100, s. 42, of common assault on a woman: *Held* that her husband was barred, under s. 45 from bringing an action for an aggravated assault.—*Holden v. King*, L.J. 46 Ex. 75; 35 L.T. 479; 25 W.R. 62.

Banker :—

- (v.) **Ch. Div. V. C. H.**—*Deposit notes*—*Change in firm*—*Liability*.—Bankers used to give deposit notes for sums deposited with them: whenever a change in the amount deposited was made, fresh notes were given for the

new balance : there having been a change in the firm, the new partners continued to pay interest on the deposits till bank stopped payment ; the notes issued on receipt of monies bore the same signature as those issued by the original firm : *Held* that plaintiffs had by their acts accepted the liability of the new partners in respect of sums deposited, and were not entitled to prove against the estate of a deceased partner of the original firm.—*Billborough v. Holmes*, 35 L.T. 759.

Bankruptcy :—

- (xxxviii.) **C. J. B.**—*Act of Bankruptcy—Bill of Sale.*—Trader indebted to firm of merchants gave a bill of sale to secure past debts and future supply of goods ; a week after execution of bill of sale the merchants took possession of the goods comprised therein, which were substantially the whole of property of the debtor, who shortly afterwards filed petition for liquidation : *Held* that bill of sale was not an act of bankruptcy.—*In re Williamson, ex parte Threlfall*, L.J. 46, Bpoy. 8 ; 35 L.T. 675 ; 25 W.R. 127.
- (xxxix.) **C. A.**—*Act of Bankruptcy—Bill of Sale—Compounding Felony.*—Decision of V. C. B., see Bankruptcy (i.) reversed.—*Ex parte Butt. Re Mapleback*, L.J. 46, Bpoy. 14 ; 35 L.T. 503 ; 25 W.R. 103.
- (xl.) **C. A.**—*Act of Bankruptcy—Bill of Sale—Foreign Trader.*—*Held* that an assignment by a foreign trader, having property abroad, of all his property in England was not an act of bankruptcy.—*Ex parte Defries, Re Myers*, 35 L.T. 392.
- (xli.) **C. A.**—*Act of Bankruptcy—Bill of Sale.*—Trustee, holder of unregistered bill of sale, took possession before debtor filed petition for liquidation by arrangement, but shortly after he had committed an act of bankruptcy without knowledge of holder : *Held* that the trustee in bankruptcy was entitled to the goods comprised in the bill of sale against the holder.—*Ex parte Attwater, Re Turner*, 35 L.T. 682 ; 25 W.R. 206.
- (xlii.) **C. A.**—*Act of Bankruptcy—Preference.*—When debtor makes over whole property to one creditor, the burden of proof that it was received in good faith and protected by Bankruptcy Act, 1869, s. 92, is on the preferred creditor.—*Re Tate, Ex parte Tate*, 35 L.J. 531 ; 25 W.R. 52.
- (xliii.) **C. A.**—*Adjudication—Evidence.*—A creditor filed adjudication petition with usual affidavit in support, the debtor disputed, but did not tender any evidence at the hearing, and the Registrar made the order for adjudication, without requiring evidence other than the affidavit from the creditor : *Held* that the adjudication must be annulled.—*Ex parte Dodd, In re Ormston*, L.R. 3, Ch. D. 452 ; 25 W.R. 185.
- (xliv.) **C. A.**—*Adjudication—Jurisdiction.*—The Court has power to refuse to adjudicate, when a bankruptcy petition is being used for an inequitable purpose, e.g. to extort money, though an act of bankruptcy has been committed.—*In re Davies, Ex parte King*, L.R. 3, Ch. D. 461 ; L.J. 45, Bpoy. 159.
- (xlv.) **C. A.**—*Adjudication—Proof for damages.*—Where in an action of tort the verdict is given before, but judgment is not signed till after, adjudication of defendant, the damages are not provable, and the bankrupt is not discharged from liability.—*In re Newman, ex parte Brooke*. L.R. 3, Ch. D. 494.
- (xli.) **C. J. B.**—*Bill of Exchange.*—A debtor's summons was issued on a bill of exchange ; the summoning creditor next day commenced an action on the bill, which debtor obtained leave to defend without security. Debtor pleaded want of consideration, and alleged that plaintiff had notice thereof : *Held* that under the circumstances, proceedings on the summons must be stayed pending the action, without requiring security from debtor.—*Ex parte Latham, re Latham*, L.R. 4 Ch. D. 105 ; 35 L.T. 674 ; 25 W.R. 231.

- (xlvii.) **C. A.**—*Bill of Exchange*.—32 and 33 Vict., c. 71, s. 28.—By scheme under Bankruptcy Act, 1869, proceedings were stayed, and debtor's property was transferred to a Company, and B. debentures were issued to creditors out of residue of profits after payment of certain charges; certain creditors held bills of debtor's, whereon acceptor had after proof paid composition of 4s. in the pound: *Held* that the acceptor was only entitled to take over debentures on payment of the debt in full.—*Ex parte Corrie, Re Fothergill*, L.J. 45, Bpcty. 153.
- (xlviii.) **C. A.**—*Bill of Exchange—Specific Appropriation*.—Vendor drew bills of exchange on purchaser for price of goods, to be placed to account of shipments; on acceptance the bills of lading were handed over to purchaser; the bills were dishonoured, and purchaser became bankrupt: *Held* that there was no specific appropriation of the proceeds of sale of the goods to meet the bills.—*In re Entwistle, ex parte Arbuthnot*, L.R. 3, Ch. D. 477.
- (xlix.) **C. J. B.**—*Bill of Sale—Order and disposition*.—Debtor gave bill of sale on goods in two houses: mortgagee sent grocer to take possession: the debtor was absent, but returned while broker was taking inventory, and stated he had that day filed liquidation petition: broker did not take possession of goods in the other house till some hours later: *Held* that the mortgagee's consent to goods being in order and disposition of debtor had been withdrawn, and the possession taken of goods in one house amounted to taking possession of all the goods in both houses.—*Re Estick, Ex parte Phillips*, 25 W.R. 230.
- (i) **C. A.**—*Bill of Sale—Registration—Rights of Trustee in Liquidation*.—Decision of C. J. B., see Bankruptcy (vii.) affirmed.—*Ex parte Leman, Re Barraud*, L.R. 4, Ch. D. 23; 35 L.T. 422; 25 W.R. 65.
- (ii.) **Q. B. Div.**—*Composition—Guarantee of Instalments*.—An adjudication of bankruptcy subsequent to a composition does not of itself release a guarantor from liability to pay instalments.—*Glegg v. Gilbey*, L.R. 2, Q.B.D. 6; L.J. 46, Q.B. 7; 35 L.T. 761; 25 W.R. 42.
- (lii.) **C. A.**—*Composition—Resolutions—Dissentient Creditor*.—Where debtor's statement showed considerable liabilities and nominal assets, and creditors passed a resolution to accept 1s. in the pound: *Held* that the resolutions were passed from motives of kindness to debtor, and that registrar rightly refused, at instance of dissenting creditor, to register them.—*Ex parte Terrell, Re Terrell*, 35 L.J. 646; 25 W.R. 153.
- (liii.) **C. A.**—*Composition—Resolutions—Fresh Meeting*.—The registration of the resolutions having been refused on grounds stated in the last preceding case, the Court gave leave to debtor to summon a fresh first meeting of creditors for purpose of offering a properly secured composition.—*Re Terrell, Ex parte Sheffield and Rotherham Banking Co.*, 35 L.T. 648; 25 W.R. 153.
- (liv.) **C. J. B.**—*Composition—Secured Creditor—Proof*.—A secured creditor is not bound by debtor's estimate of value of the security, and in a composition is entitled to abstain from proving his debt, and may, after realizing his security, claim payment of the composition on the balance of his debt.—*In re Bestwick, Ex parte Bestwick*, L.R. 2, Ch. D. 485; L.J. 45, Bpcty. 148; 34 L.T. 784; 24 W.R. 938.
- (lv.) **C. A.**—*Compromise—Examination of Creditor*.—Three years after commencement of bankruptcy a mortgagee who had foreclosed before the bankruptcy claimed to prove for balance of mortgage debt: trustee, with sanction of committee of inspection, entered into compromise whereby the claim was admitted without inquiry, but postponed until other creditors had received 18s. in the pound: *Held* that the compromise was not authorised by Bankruptcy Act, 1869, s. 27, and that bankrupt was entitled to an order for examination of the creditor.—*Re Austin, Ex parte Austin*, L.R. 4, Ch. D. 13; L.J. 46, Bpcty. 1; 35 L.J. 529; 25 W.R. 51.

- (lvi.) **C. J. B.**—*Contempt of Court—Injunction*.—Where sheriff's officer and auctioneer sold goods of a trader under *fi. fa.*, after receipt of notice by letter that debtor had filed liquidation petition, and by telegram that the Bankruptcy Court had made order restraining proceedings under the writ: *Held* that they were guilty of contempt.—*Re Bryant*, L.R. 4, Ch. D. 98; 35 L.T. 489; 25 W.R. 230.
- (lvii.) **C. A.**—*Fraudulent Preference—Stock Exchange*.—A member of the Stock Exchange, being unable to meet his engagements, informed the secretary, and was declared a defaulter; in compliance with the rules he transferred balance at bank for distribution amongst Stock Exchange creditors; at a meeting of such creditors, at which a composition was accepted, he falsely stated he had no other creditors; he was subsequently adjudicated bankrupt on petition of a creditor not a member of the Stock Exchange: *Held* that the transfer was a fraud on the Bankruptcy Law, and that the money must be refunded to the trustee.—*Ex parte Saffrey, Re Cooke*, 35 L.T. 715; 25 W.R. 218.
- (lviii.) **Ch. Div. V. C. B.**—*Jurisdiction—Chancery or Bankruptcy*.—Demurrer allowed to bill filed by insolvent debtor under 7 and 8 Vic., c. 70, for rectification of deeds and charging trustees with wilful default and neglect, on the ground that the Court of Bankruptcy had jurisdiction to grant the relief sought.—*Hutchinson v. Baslam*, 35 L.T. 467; 25 W.R. 54.
- (lix.) **C. A.**—*Liquidation—Arrangement—Surety*.—By a scheme of arrangement under Bankruptcy Act, 1869, s. 28, assets of a liquidating firm were made over to a company and debentures issued to creditors. C., a creditor who had accepted accommodation bills of the firm, subsequently filed liquidation petition, and paid composition of 4s. in the pound; holders of the bills proved against C's estate and received compositions to amount of £32,000; they also proved against the estate of the firm, some having received the composition for 16s. in the pound, others for the whole amount. *Held* that as regards those who proved for the whole amount the debentures were issued merely in substitution of their dividends which would have been payable under a bankruptcy, and that the scheme did not alter the position of C. as surety so as to entitle him to receive anything until the creditors had been paid in full.—*Ex parte Turquand, re Fothergill*, L.R. 3 Ch. D. 445.
- (lx.) **C. J. B.**—*Liquidation—Building Contract—Lien*.—A. entered into contract with building club to build certain houses, the architect being empowered, on default or bankruptcy of contractor, to complete the works and seize materials and plant, giving two days' notice of intention so to do; on 30th May architect gave such notice, and on the same day A. filed liquidation petition; on 2nd June architect seized plant, &c.: *Held* that the proviso gave the club an equitable lien, and protected the seizure under Bankruptcy Act, 1869, s. 94.—*Ex parte Dickin, Re Wangle*, 35 L.T. 769.
- (lxi.) **C. A.**—*Liquidation—Composition—Judgment-creditor*.—A judgment creditor delivered a writ of *fi. fa.* to the sheriff before debtor filed liquidation petition; the creditors accepted a composition; after registration of the resolutions the sheriff seized under the writ: *Held*, affirming decision of C. J. B. (see Bankruptcy xxv., p. 6), that the writ could not be enforced.—*In re Balbirnie, ex parte Jameson*, L.R. 3 Ch. D. 488; 35 L.T. 533; 25 W.R. 14.
- (lxii.) **C. A.**—*Liquidation—Partnership—Costs*.—A petition for liquidation was filed by one partner, his co-partner being an infant, the joint estate was by consent administered by the trustee, the liquidating partner had no separate estate: *Held* that costs of debtor's solicitor, up to the appointment of trustee, must be paid out of the joint estate.—*Re Mew, Ex parte Pearce*, L.R. 2 Ch. D. 320; L.J. 45 Bpccy. 141; 34 L.T. 705; 24 W.R. 808.
- (lxiii.) **C. A.**—*Liquidation—Stockbroker—Following trust property*.—A trustee instructed stockbroker to sell out consols, and invest proceeds in railway

stock, informing him the fund was trust property; broker sold for cash and paid in proceeds to his own account at bank, and bought the railway stock for settling day; before paying for the railway stock, broker was declared defaulter and afterwards filed liquidation petition: *Held* that broker's balance at bank must be appropriated to replacing the trust money.—*Ex parte Cooke, Re Strachan*, 35 L.T. 649; 23 W.R. 171.

- (lxiv.) **C. J. B.—Proof—Loan to Trader.**—A., a trader, married his deceased wife's sister, who paid over to him a sum of £3,000 upon the understanding that he should, when called upon, execute a proper settlement or declaration of trust thereof: A. having filed petition for liquidation: *Held* that proof could not be admitted until after payment in full of the trade creditors.—*Ex parte Corbridge, re Beale*, 35 L.T. 768.
- (lxv.) **C. J. B.—Proof—Partnership.**—To secure advances by a bank to A., trading as A. & Co., B. guaranteed payment of balance to become due on joint account opened by A. and B. to extent of £1,000; A. having become bankrupt, the bank proved for whole balance due. B. paid to bank £1,000 and was released from all claims in reference to his guarantee or in connection with A. & Co.; two years afterwards the trustee rejected the proof. *Held* that the proof must be admitted because (1) the trustee was precluded from rejecting it by laches, (2) there was no partnership between A. & B., (3) there was no right of A. to contribution by B. so that release of B. did not operate as release of A.—*Ex parte Halifax Joint Stock Banking Co., Re Armitage and Co.*, 35 L.T. 554; 25 W.R. 83.
- (lxvi.) **C. J. B.—Secured creditor—Receiver—Priority—Notice.**—A receiver appointed on dissolution of a partnership was a secured creditor of one of the partners, and subsequently received notice of assignment by such partner to a third person of his interest. *Held* that the receiver did not by omitting to give notice of his charge, lose his priority.—*Re Lewer, Ex parte Wilkes*, L.R. 4 Ch. D. 101; 35 L.T. 557; 25 W.R. 64.
- (lxvii.) **Ex. Div.—Trustee—Action—Estoppel.**—A trustee who, under Common Law Procedure Act, 1852, s. 142, has refused to proceed with an action brought by debtor before insolvency, is not thereby estopped from bringing a fresh action for the same cause.—*Bennett v. Gamgee*, L.R. 2, Ex. D. 11; L.J. 46, Bpcy. 33; 35 L.T. 764; 25 W.R. 81.
- (lxviii.) **C. A.—Trustee—Appointment.**—A debtor trading in England and Scotland filed liquidation petition in England on 12th July: the creditors held first meeting, but adjourned to await result of proceedings in Scotland: they met again on 10th February, and passed resolution for liquidation and appointed trustee: *Held* that the appointment, being more than six months after filing of petition, was void.—*Ex parte Fennig, Re Wilson and Armstrong*, L.R. 3, Ch.D. 455; 25 W.R. 185.
- (lxix.) **C. J. B.—Trustee—Bond.**—A County Court Judge has jurisdiction to enforce a trustee's bond in which name of Chief Judge in Bankruptcy was inserted as obligee.—*In re Parry*, 35 L.T. 768; 25 W.R. 128.
- (lxx.) **C. A.—Trustee—Disclaimer.**—Trustees, after notice to decide as to disclaimer, continued debtor's contracts for two years, and then abandoned them: *Held*, affirming decision of C. J. B., see Bankruptcy (xxxi.), that the only remedy of persons aggrieved was to prove against debtor's estate for damages.—*Ex parte Davis, In re Sneezum*, L.R. 3, Ch.D. 463; L.J. 45, Bpcy. 137; 35 L.T. 389; 25 W.R. 49.
- (lxxi.) **C. A.—Trustee—Disclaimer—Penalty.**—A firm of builders contracted to build a school by a certain date, and on default to pay £1000 as liquidated damages; they subsequently went into liquidation, and the trustee disclaimed the contract: *Held*, reversing decision of C.J.B. (35 L.T. 558; 25 W.R. 100), that the governors of the school were only entitled to prove for the damage actually caused by breach of contract.—*Ex parte Copper, Re Newman*, 35 L.T. 720.

- (lxxii.) **C. A.—Trustee—Solicitor's Lien.**—Where a change of trustee and solicitor had taken place, *Held* that the solicitor had a lien for his costs on the papers in the suit, and that the old trustee was not liable to discharge such costs.—*In re Austin, Ex parte Yalden*, 35 L.T. 620; 25 W.R. 134.
- (lxxiii.) **C. A.—Trader.**—A professional nurse, who keeps a lodging and boarding house for invalids, is an hotel keeper, and therefore a trader within the Bankruptcy Act, 1869.—*Ex parte Thorne, In re Jones*, L.R. 3 Ch. D. 457; L.J. 45 Bpoy. 158; 35 L.T. 632; 25 W.R. 186.
- (lxxiv.) **C. J. B.—Voluntary Settlement.**—A., in 1858, not being a trader, settled £1,000 on himself for life or till bankruptcy, with remainders for benefit of wife and children; in 1873 he engaged in trade, and in 1875 was adjudicated a bankrupt: *Held* that the settlement was void against creditors.—*In re Pearson, ex parte Stephens*, 24 W.R. 236.

Bill of Exchange:—

- (iii.) **C. A.—Notice of dishonour.**—Indorser of accommodation bill is entitled to notice of dishonour, unless he clearly would not have, if he paid the bill, any remedy against any other party thereto.—*Turner v. Samson*, L.R. 2 Q.B.D. 23; 35 L.T. 537.
- (iv.) **C. P. Div.—Notice of dishonour.**—To statement of defence setting up absence of notice of dishonour, plaintiff replied that neither when bill was drawn, nor afterwards, nor when it became due and on presentment, had the acceptor or drawer or any indorser prior to defendant any effects of defendant in his hands, and the bill was drawn, accepted, and endorsed by defendant and prior indorsers to raise money for defendant, the drawer, the acceptor, and the prior indorsers jointly, and defendant was in no way damaged even if there was no notice: *Held* a bad reply, *Foster v. Parker*, L.R. 2 O.P.D. 18; L.J. 46 C.P. 77.
- (v.) **Ch. Div. V. C. H.—Specific Appropriation.**—Y. a Costa-Rican merchant, shipped coffee to M. & Co., London, for sale, "on the strength of which," he drew bills on them: there was an agreement between Y. and E. & Co., of Panama, to share profit and loss of the transaction; the bills having come into plaintiff's hands were dishonoured by M. & Co.; Y. wrote to S., requesting him to honour the bills, and to obtain bills of lading of the coffee from M. & Co.; S., on receipt of the warrants, informed plaintiffs that he could dispose of the coffee as instructed by the sender; M. & Co. obtained attachment of the coffee in Mayor's Court for a debt owing by E. & Co.: S. sold the coffee, and paid proceeds into Court: *Held* that there was no specific appropriation of the coffee to meet the bills.—*Ranken v. Alfaro*, 35 L.T. 664.

Bill of Sale:—

- (iv.) **Ex. Div.—Affidavit—Mistake.**—Where the affidavit was by mistake dated 17th of February, 1806 (for 1876), and the attesting witness was merely described as a clerk: *Held* that the bill of sale was valid.—*Lamb v. Bruce*, L.J. 45, Ex. D. 538; 35 L.T. 425; 24 W.R. 645.
- (v.) **Q. B. Div.—Affidavit—Mistake.**—A variation between bill of sale and affidavit as to one of Christian names of giver of bill, *Held* to be immaterial.—*Corbett v. Rowe*, 25 W.R. 59.
- (vi.) **Ex. Div.—Registration.**—17 & 18 Vict. c. 36.—W. being indebted to M., agreed to sell to him certain furniture, and a document was drawn up giving a list of goods and prices, and comprising a memorandum acknowledging the sale and payment of the consideration under the agreement arranged with respect to the rent owing; no money then passed, and the goods remained in W.'s possession: *Held* that the document did not require registration under Bill of Sales' Act.—*Graham v. Wilcockson*, L.J. 46, Ex. 55; 35 L.T. 601.

Building Society :—

- (i.) **C. A.**—*Winding up.*—Held that “realised” members of a benefit building society who had paid up the full amount of their shares, and “withdrawal” members who had not paid in full, but had given notice to withdraw, were, on the construction of the rules, entitled to share in distribution of assets of the society in winding up, in priority to “investing” members who had not paid in full nor given notice of withdrawal.—*Re Norwich and Norfolk Provident Building Society, Ex parte Rackham*, L.J. 45, Ch. 785.

Canada, Law of :—

- (iii.) **P. C.**—*Marriage contract—Clause of reprise.*—A married woman may consent to hypothecation of property in community, and renounce in favour of husband's creditors her claims, under a clause of reprise in her marriage contract: an interlineation, necessary to sense of context, does not require notary's initials or certificate.—*Hamel v. Panet*, 35 L.T. 741.
- (iv.) **P. C.**—*Quebec Elections Act, 1875—Right of Appeal.*—The Prerogative of the Crown to entertain appeals can only be taken away by express words, but the jurisdiction of Colonial Courts in election petitions is special, and does not involve right of appeal to the Crown.—*Theberge v. Laundry*, 35 L.T. 640; 25 W.R. 216.

Company :—

- (xvi.) **C. A.**—*Contract—Fraud.*—Defendant company agreed to sell to plaintiff for £15,000 exclusive right to use at Berlin a process patented in England: plaintiff was then aware, but not directors of defendant company, that by German law no such exclusive user could be obtained; plaintiff's intention was that ostensible grant of exclusive user might float a company to work process at Berlin. Held that plaintiff paid the £15,000 for purposes of fraud, and could not recover on ground of failure of consideration.—*Begbie v. Phosphate Sewage Co.*, L.R. 3, Q.B.D. 679; 35 L.T. 350; 25 W.R. 85.
- (xvii.) **C. A.**—*Director—Qualification—Sci. fa.*—By Special Act defendant and other promoters of company were appointed directors till first general meeting: no such meeting was held, nor was there any register of members or allotment of shares to defendant: Held, affirming decision of C. P. D., that defendant was liable, under a *sci. fa.*, as a shareholder in respect of his full director's qualification.—*Portal v. Emmens*, L.R. 1, C.P.D. 664.
- (xviii.) **C. A.**—*Meeting of Creditors—Declaration of insolvency.*—Directors called a meeting of principal creditors, and stated that company was embarrassed for want of working capital, and requested extension of credit: Held that this was not a declaration of insolvency such as to entitle a creditor, who had agreed to supply goods on credit, to refuse to deliver except for cash.—*Re Phoenix Bessemer Co., ex parte Curnforth Hematite Co.*, 25 W.R. 187.
- (xix.) **C. A.**—*Meeting of Shareholders.*—Held in the case of a company under the Stannaries Acts where no quorum was required to constitute a meeting, that there was no meeting where only one shareholder attended.—*Sharp v. Dawes*, L.R. 2 Q.B.D. 26; 25 W.R. 66.
- (xx.) **C. A.**—*Misrepresentation.*—Directors issued stock as “No. 1 preference stock” in bona fide belief that such issue was within their powers, and it was so described on the certificates; it subsequently appeared that directors had no power to issue such stock, and that the stock issued was really of little value: Held that no misrepresentation had been made by directors so as to render them liable to a transferee of the issued stock.—*Eaglesfield v. Marquis of Londonderry*, 25 W.R. 190.
- (xxi.) **Ch. Div. V. C. M.**—*Misrepresentation—Promoters' Sale.*—Defendants bought property for £35,000, and sold to the company promoted by them for £110,000; the prospectus contained misrepresentations as to value, which might have been detected by examination of documents referred to,

and stated that provisional contract for purchase had been entered into by the directors, whereas, out of five directors, only three had been present at the meeting, and two of these were nominees of vendors: *Held* that the company were not entitled to set aside the contract nor to demand repayment of the difference.—*New Sombrero Phosphate Co. v. Erlanger*, 55 L.T. 309; 25 W.R. 18.

- (xxii.) **Ex. Div.**—*Registration of Shareholders—Rectification*.—25 & 26 Vict. c. 89, s. 35.—The jurisdiction of a judge at chambers under Companies' Act, 1862, to rectify register by ordering the omission of one or two parties, and insertion of name of the other, is discretionary, and will not be exercised in a case which is really an action for specific performance.—*In re Shaw*, L.J. 46, Ex. 65; 25 W.R. 213.
- (xxiii.) **C. A.**—*Registration—Fully paid-up Shares*.—30 & 31 Vict. c. 131, s. 25.—Where a contract for allotment of fully paid-up shares was not filed with Registrar, but a transfer thereof was registered as of fully paid-up shares: *Held* that the transferee was liable as a contributory.—*Re Heaton Steel and Iron Co. Blyth's Case*, 25 W.R. 200.
- (xxiv.) **Ch. Div. M. R.**—*Registration—Mortgage*.—A Company mortgaged chattels to two of its Directors, who gave particulars to Secretary, and requested him to register the mortgages, but he omitted to do so; the Directors having realised their security, the Company was subsequently wound up: *Held* that they were entitled to retain proceeds of security.—*In re Borough of Hackney Newspaper Co.*, L.R. 3, Ch. D. 669.
- (xxv.) **C. A.**—*Resolutions—Ultra vires*.—*Held* affirming decisions of V.C.B. (35 L.T. 623; 25 W.R. 67,) that a Company passed a resolution for diminishing the capital by buying up shares; the articles did not provide for such diminution, but did provide that any shareholder instituting legal proceedings against the Company should forfeit his shares: plaintiff having commenced action to restrain the Company from carrying out the resolution, *Held* that the resolution was invalid, and that the forfeiture did not deprive plaintiff of his right of action.—*Hope v. International Financial Society*, 25 W.R. 203.
- (xxvi.) **Ch. Div. V. C. H.**—*Winding-up—Advertisements*.—Winding-up order, notwithstanding error as to name of Company in first advertisement of petition, corrected by fresh advertisements on the following day.—*Re Consolidated Minera Lead Mining Co.*, 25 W.R. 36.
- (xxvii.) **Ch. Div. M.R.**—*Winding-up—Contributory*.—Articles of Association of Company, registered 6th of November, 1874, provided that qualification of director should be twenty-five shares, that M. and others should be original directors that they should hold office till 1876; but should vacate office on ceasing to hold qualifying shares; the articles also provided that in consideration of services, each original director should receive twenty-five fully paid-up shares, to be forfeited on ceasing to be director: M. attended directors' meeting on 10th November, 1874, but resigned on the 12th, and never applied for shares, or took further part in affairs of Company; he was registered as owner of twenty-five shares: *Held* that the last provision, above referred to entitled M. to be removed from the list of contributories, but that otherwise he would have been liable.—*Milner's Case. Re Australian Direct Steam Navigation Co.*, L.R. 3, Ch. D. 166.
- (xxviii.) **Ch. Div. V. C. B.**—*Winding-up—Contributory*.—A shareholder in an English company, resident at Bombay, became insolvent, and obtained discharge under an Indian Act: *Held* that the liability in respect of the shares was not proveable in the insolvency nor barred by the discharge, and the name was ordered to be placed on the list of contributories.—*In re East India Cotton Agency. Furdoomjee's Case*, L.R. 3, Ch. D. 264.
- (xxix.) **C. A.**—*Winding-up—Marshalling assets*.—G. & Co., creditors of an unlimited insurance company, were under an order of Court, paid in full out of the limited assets: *Held* that the order could not be varied on the

application of another creditor entitled to the surplus of the limited assets, there being no equity to have the assets marshalled.—*Re International Life Assurance Society*, L.R. 2, Ch. D. 476; L.J. 45, Ch. 766; 34 L.T. 782; 24 W.R. 627.

- (xxx.) **C. A.**—*Winding-up—Proof*.—Creditor holding debentures of company bearing £6 per cent. interest, obtained a judgment in respect of the debt, and was admitted to prove for the same with £4 per cent. interest: *Held* that the creditor was not entitled to prove for additional interest.—*Re European Central Rail. Co., Ex parte Oriental Financial Corporation*, L.R. 4, Ch. D. 38; L.J. 46, Ch. 57; 35 L.T. 588; 25 W.R. 92.
- (xxxi.) **Ch. Div. V. C. M.**—*Winding-up—Rent—Distress*.—The landlord of an insolvent company is not entitled, under Judicature Act, 1875, s. 10, to levy distress, after commencement of winding-up, for rent accrued due previously.—*Re Coal Consumers' Association*, 35 L.T. 729.

Copyright :—

- (i.) **Ch. Div. M. R.**—*Assignment*.—5 & 6 Vict. c. 45, s. 22.—An assignment of a copyright must be in writing.—*Layland v. Stewart*, 25 W.R. 225.
- (ii.) **C. A.**—*Infringement*.—To support action under 3 & 4 Wm. IV., c. 15, s. 2, there must be a substantial infringement.—*Chatterton v. Cave*, 35 L.T., 587; 25 W.R. 102.
- (iii.) **Ch. Div. M. R.**—*Periodical—Registration*.—The registration of the first number of a periodical protects articles in subsequent numbers.—*Henderson v. Maxwell*, L.J. 46, Ch. 59; 25 W.R. 66.
- (iv.) **C. A.**—*Publication—Drama*.—*Held*, affirming decision of V.C.M. (33 L.T. 541), that a drama which had been first represented in America, and afterwards in England, but never printed, had been "first published out of Her Majesty's dominions," within 7 Vict., c. 12, s. 19, and that plaintiff had no exclusive right of representing it in England.—*Boucicault v. Chatterton*, 35 L.T. 745.

County Court :—

- (iii.) **App. Div. Ct.**—*Appeal—Jurisdiction*.—A judge at Chambers has no power on a day when this Court sits to grant order to show cause why a County Court Judgment should not be set aside; an appeal having been struck out as being so granted, this Court has no power to give costs to party appearing to show cause.—*Brown v. Shaw*, L.R. 1, Ex. D. 425.
- (iv.) **Ch. Div. V. C. M.**—*Appeal—Jurisdiction*.—21 and 22 Vict., c. 74, s. 4.—An application that a County Court judge sign a case for an appeal should be made to the "Superior Court," not to a single judge thereof.—*Clarke v. Roche*, 35 L.T. 705.
- (v.) **App. Div. Ct.**—*Ejectment—Value*.—Defendant, in action of ejectment, applied for prohibition on ground that the property was of greater annual value than £20; the summons was dismissed by judge of Superior Court: *Held* that County Court judge at trial of action rightly refused to admit evidence of value as being "res judicata."—*Symons v. Rees*, 25 W.R. 116; L.R. 1, Ex. D. 416.

Crimes and Offences :—

- (vii.) **C. A.**—*Appeal in criminal cases—Costs*.—The Court of Appeal has no jurisdiction in a question relating to taxation of costs of a criminal information given under Lord Campbell's Act, s. 8.—*Regina v. Steel*, L.J. 46, M.C. 1; 35 L.T. 534; 25 W.R. 34.
- (viii.) **C. A.**—*Appeal in Criminal Cases—Jurisdiction*.—An application for certiorari to quash conviction for want of jurisdiction of convicting justice is a "criminal cause or matter," and no appeal lies from decision of Q. B. Div.—*Reg. v. Fletcher, Ex parte Birnie*, L.J. 46, M.C. 4; 35 L.T. 538; 25 W.R. 149.

- (ix.) **App. Div. Ct.—Cruelty to Animals—Impounding.**—A pound-keeper cannot, under 12 & 13 Vict. c. 92, s. 5, be convicted for neglecting to provide animals impounded with necessary food and water.—*Dargan v. Davies*, 25 W.R. 230.
- (x.) **C. C. R. Embezzlement.**—It was the duty of prisoner, the chief manager of an insurance office, to receive remittances from branch offices and hand them over to the cashier: he received two cheques so remitted and indorsed, and cashed them through private friends, and on the same day paid the amount received to the cashier to be put against his salary, which was overdrawn, and took a receipt from the cashier: *Held* that prisoner was properly indicted for embezzlement.—*Regina v. Gale*, 35 L.T. 526.
- (xi.) **C. C. R.—Embezzlement—Broker.**—Prisoner was entrusted with marine policies to collect what was due on them, and paid what he received to his own account at his bankers: his outlay for premiums and commission was owing to him: he never paid over the sums received by him, but filed petition for liquidation: jury found that the policies were intrusted to prisoner for the special purpose of forthwith paying the proceeds over: conviction quashed on the ground that the finding was unsupported by evidence.—*Regina v. Tatlock*, L.J. 46, M.C. 7; 35 L.T. 520.
- (xii.) **C. C. R.—False Pretences—Evidence—Entries not made by witness.**—Prisoner gave a falsified list of days during which workmen had been employed to clerk A., who entered the same in the time book; on the pay day these entries were read out in the hearing of B., the pay clerk who paid the wages calculated accordingly: *Held* that the time-book was properly admitted at the trial to refresh B.'s memory.—*Regina v. Langhton*, 35 L.J. 527.
- (xiii.) **C. C. R.—Larceny—Bill of Exchange.**—Prisoner, the drawer of a bill for £200, which prosecutor accepted and delivered to him to get discounted, took it to creditors of his own, indorsed as his own, in payment of his own debt to them: the jury found it was prisoner's intention to pass the property in the bill absolutely to the creditors: *Held* that prisoner was rightly convicted as a bailee of the bill under 24 & 25 Vict. c. 96, s. 8.—*Regina v. Orenham*, 35 L.J. 490.
- (xiv.) **App. Div. Ct.—Trespass in pursuit of Game—Claim of Right.**—Appellant, a gamekeeper in employment of lessees of shooting from the lord of the manor of W., who claimed right to shoot over part of the glebe, was charged with trespass on the glebe; he proved that he went on the land by his employer's orders, but not that the land in question was the disputed part of the glebe: *Held* that the conviction was right.—*Birnie v. Marshall*, 35 L.T. 373.

Debtor and Creditor :—

- (vi.) **Ex. Div.—Crown Debt—Costs of Appeal to H. L.**—A recognisance for costs of appeal to House of Lords constitutes a Crown debt; a person whose recognisance had been estreated, and who had been imprisoned, was released by favour of the Court on giving a promissory note for his debt.—*Re A. H. Smith*, L.J. 46, Ex. 73; 25 W.R. 184.
- (vii.) **Ch. Div. V. C. H.—Executor—Retainer.**—A creditor after having proved his debt in the cause, bequeathed it to the executrix of testator: *Held* that the executrix did not acquire a right of retainer in respect of such debt.—*Jones v. Evans*, L.R. 2, Ch. D. 420; L.J. 45, Ch. 751; 24 W.R. 778.
- (viii.) **C. P. Div.—Fraud.**—Debtor assigned all his estate to defendants, two of his creditors, for the benefit of all his creditors, on an agreement with defendants that in consideration of his so doing they would pay him back £50: *Held* that the agreement was a fraud upon the creditors and void.—*Blacklock v. Dobie*, L.R. 1, C. P. D. 265; L.J. 45, C.P. 498; 35 L.T. 538; 24 W.R. 674.

Defamation :—

- (iii.) **C. A.**—*Slender—Privilege of witness.*—Decision of C. P. Div., see Defamation (ii) affirmed.—*Seaman v. Netherclift*, 25 W.R. 159.

Detinue :—

- (i.) **Ex. Div.**—*Acquittal of prisoner—Detention of property—Action against constable.*—Plaintiff was tried for stealing a diamond ring and acquitted; defendant, a police superintendent, within a reasonable time of the acquittal, applied to magistrate for order under 2 and 3 Vict., c. 71, s. 29, as to disposal of the property; the magistrate having adjourned the hearing, the superintendent detained the ring: *Held* that an action against the superintendent for detention and conversion was not maintainable.—*Bullock v. Dunlop*, 35 L.T. 633; 25 W.R. 98.

Easement :—

- (i.) **C. P. Div.**—*Light.*—The owner of a house sold adjacent land without reserving his right to lights: the purchaser built on the land, part of which was alleged to be a public street: *Held* that an action for obstruction of ancient lights by building was not maintainable.—*Ellis v. Manchester Carriage Co.*, L.R. 2, C.P.D. 13; 25 W.R. 229; 35 L.T. 476.
- (ii.) **Ch. Div. V. C. H.**—*Light—Air—Mandatory Injunction.*—Where plaintiff had only a life interest, and the obstruction interfered with present enjoyment, but did not injure saleable value of the property: the Court refused mandatory injunction, and gave nominal damages.—*Perkins v. Slater*, 35 L.T. 356.
- (iii.) **Q. B. Div.**—*Right to Support.*—Defendant employed contractor to rebuild his house; the latter undertook to prevent or make good any damage to adjoining house of plaintiff: *Held* that defendant was liable for injury by insufficiency of support of plaintiff's house.—*Bower v. Peatr*, L.R. 1, Q.B.D. 321; L.J. 45, Q.B. 446; 35 L.T. 821.

Ecclesiastical Law :—

- (vi.) **Ch. Div. V. C. B.**—*Adwovson.*—An adwovson was vested in trustees for the parishioners and ratepayers who on a vacancy had right of electing incumbent, the churchwardens carried out the election against the wishes of the electors according to former custom: *Held* that the electors were entitled to adopt what mode of election they thought fit, but that, it not having been proved that the result would have been different if the election had been according to their wishes, the election could not be set aside.—*Shaw v. Thompson*, L.R. 3, Ch. D. 233; L.J. 45, Ch. 827; 34 L.T. 721.
- (vii.) **H. L.**—*New Parish—Churchwardens—Custom—Private Act.*—The parish of D. contained four hamlets, D., W., M., and B.; the churchwardens of hamlet D., which contained the parish church, were elected, one by the rector, the other by the parishioners; the churchwardens of hamlet M. were elected independently of D. by the inhabitants, and the right was confirmed by a legal decision in 1872; a private Act created D. and W. one parish, M. another, and B. a third, and provided that the churchwardens of each should be elected as those in D. had hitherto been: *Held* that the right of the inhabitants of M. to elect both churchwardens was impliedly abrogated by the private Act.—*Green v. The Queen*, L.R. 1, App. 513; 35 L.T. 495.

Election :—

- (vii.) **C. A.**—*Local Board—Decision of Chairman.*—11 & 12 Vict. c. 63, s. 27.—*Held*, affirming decision of Q. B. Div., that at the election of members of a Local Board of Health, the decision of the returning officer as to the validity of votes is conclusive, but that errors in casting up votes may be rectified.—*Reg. v. Collins*, L.R. 2, Q.B.D. 30.
- (viii.) **Q. B. Div.**—*Municipal Election—Mandamus.*—J., a town councillor, compounded with his creditors and ceased to act till expiration of period of office, but no declaration of avoidance of office was made by the

Council: on November 1st, three offices besides J.'s became vacant: all the candidates having been nominated by the same person, the Mayor declared the nominations void, and the returning officer declared that the retiring councillors, including J., were re-elected: *Held* that J. was a retiring councillor within 22 Vict. c. 35, s. 8, subsection 4, and that no mandamus would issue for a fresh election.—*Reg. v. Mayor, &c., of Welchpool*, 35 L.T. 594.

- (ix.) **C. P. Div.**—*Parliamentary Franchise*.—Grantee of a 40s. freehold rent-charge issuing out of a reversion, is entitled to vote for county.—*Dawson v. Robins*, L.R. 2, C.P.D. 38; L.J. 46, C.P. 62; 35 L.T. 599; 25 W.R. 212.
- (x.) **C. P. Div.**—*Parliamentary Franchise—Alms*.—2 Will. iv., c. 45, s. 36.—Property was devised to trustees upon trust to distribute "to the poorest inhabitants," as the trustees should think fit: *Held* that persons who received grants from this charity were disqualified from voting.—*Harrison v. Carter*, L.R. 2, C.P.D. 26; L.J. 46, C.P. 57; 35 L.T. 511; 25 W.R. 182.

Evidence:—

- (iii.) **Ch. Div. M. R.**—*Admissibility—Entries against interest*.—*Held* that entries by a deceased person of payment of interest to him were admissible as evidence for all purposes, as being *prima facie* against interest.—*Taylor v. Witham*, L.R. 3 Ch. D. 605; L.J. 45 Ch. 798; 24 W.R. 877.

Fishing:—

- (ii.) **App. Div. Ct.**—*Public right—Non-tidal river*.—No public right of fishing can exist in law in a non-tidal river, made navigable by locks.—*Mussett v. Burch*, 35 L.T. 486.

Fraud:—

- (i.) **Q. B. Div.**—*Release obtained by misrepresentation*.—Where in an action for injury by a railway accident it was alleged that a release by plaintiff of all claims against the company had been obtained by fraudulent misrepresentations of fact and legal effect, demurrer overruled.—*Herschfield v. London, Brighton, and South Coast Rail. Co.*, L.R. 2 Q.B.D. 1; 35 L.T. 473.

Highway:—

- (v.) **App. Div. Ct.**—*Surveyor—Removal of private culvert*.—Appellant, a highway surveyor, removed a private culvert, laid down by respondent on the highway, as a nuisance thereto, and was summoned before justices by respondent for malicious injury to property; the justices found that appellant had not acted under reasonable supposition of right. *Held* that conviction was wrong.—*Denny v. Thwaites*, 35 L.T. 628.

Husband and Wife:—

- (vi.) **Ch. Div. V. C. B.**—*Bankruptcy of Married Woman*.—Where proceedings in bankruptcy were pending against a married woman trading separately from her husband, *Held* that plaintiff must either get the proceedings annulled, or apply for relief in bankruptcy.—*Doy v. Freund*, 35 L.T. 551; 25 W.R. 222.
- (vii.) **P. D. & A. Div.**—*Desertion*.—Husband with wife's consent left her and went to Australia; he never sent her any money, and after four years ceased corresponding with her, and formed an adulterous connection: *Held* that he was guilty of desertion.—*Strickland v. Strickland*, 35 L.T. 767; 25 W.R. 114.
- (viii.) **P. D. & A. Div.**—*Divorce—Apportionment of Damages*.—Under the circumstances of the case a sum of £5000 was awarded to petitioner as damages in a divorce suit, and was ordered to be apportioned as follows:—£1500 to be settled on child of the marriage, in case of his death to revert to petitioner; petitioner's extra costs to be paid; £1500 to be paid to petitioner; the balance to be invested in purchase of an annuity for life

of respondent, payable to her *dum casta vixerit*, but to revert to petitioner on forfeiture or her re-marriage.—*Meyern v. Meyern and Myers*, 25 W.R. 115.

- (ix.) **P. D. & A. Div.—Divorce—Queen's Proctor.**—Where the Queen's Proctor appeared to show cause against a decree nisi on wife's cross-petition being made absolute, and filed affidavits charging additional acts of adultery not charged in husband's petition, and wife filed affidavits denying such charges, the Court ordered an issue to be settled for trial by jury.—*Studholme v. Studholme and Cullum*, 25 W.R. 165.
- (x.) **P. D. & A. D.—Nullity suit—Delay.**—Parties were married in 1849; the cohabitation was interrupted by long separations on the alleged ground of husband's ill-treatment; in 1875 the wife brought a suit for nullity of marriage on the ground of the husband's impotence, which was proved: *Held* that unreasonable delay disentitled petitioner from relief.—*R. (falsely called W.) v. W.*, L.J. 45, P.D.At. 89; 25 W.R. 25.

Infant:—

- (i.) **Ch. Div. M. R.—Custody.**—The custody of an infant is entirely within the discretion of the Court who primarily consider the infant's interests.—*Re Taylor*, 25 W.R. 69.
- (ii.) **Ex. Div.—Tort independent of contract.**—Defendant hired a mare and dog-cart from plaintiff on condition of taking with him only one person; he took with him three other persons, and so over-drove and ill-treated the mare that she was seriously injured, and had to be destroyed: *Held* that, besides breach of contract, defendant had committed an independent tort to which a plea of infancy was no defence.—*Walley v. Holt*, 35 L.T. 631.

Insurance:—

- (xi.) **C. A.—Dissolution.**—Deed of settlement of R. N. Society provided that property of the Society should alone be answerable for claims, and also that business might be transferred; the Society granted an annuity to D., which declared that the property of the Society should be liable to pay the annuity; subsequently the R. N. Society transferred its business to the E. Society: *Held* that notwithstanding omission of reference to the deed of settlement in the annuity deed, D. could only claim against E. Society.—*Re European Assurance Society, Dowse's Case*, L.R. 3, Ch.D. 384; 35 L.T. 653.
- (xii.) **H. L.—Marine Insurance—Insurable Interest.**—Ship, whose cargo was insured by plaintiff, suddenly sank, while anchored in harbour: part of cargo, which had been shipped, was lost, but part was not yet shipped: *Held* that (1) upon the facts there was evidence of peril insured against, (2) on construction of policy plaintiff had no insurable interest in cargo till whole was shipped.—*Anderson v. Morice*, L.J. 46, C.P. 11; 35 L.T. 566; 25 W.R. 14.
- (xiii.) **C. A.—Novation.**—M. effected policy with B. N. Association, which subsequently amalgamated with E. Society; afterwards a memorandum was indorsed on policy, declaring that parts of E. Society should be liable provided the premiums should be paid to the E. Society: the premiums were accordingly so paid: *Held* that there was complete novation, and that M. could not claim against B. N. Association.—*Re European Assurance Society. Miller's Case*, L.R. 3, Ch. D. 391.
- (xiv.) **C. A.—Registration—Contributory.**—*Held* that a past member of an insurance company, originally registered under 7 & 8 Vict. c. 110, but compulsorily registered under Companies' Act, 1862, s. 209, was liable as a contributory under s. 38.—*Re European Assurance Society. Ramsay's Case*, L.R. 3, Ch. D. 388; 35 L.T. 654.

Landlord and Tenant:—

- (ix.) **Ch Div. V. C. B.—Agreement for Lease—Minerals—Specific Perform-**

ance.—Agreement for lease by A. to B. and C. of a vein of coal under a certain farm for 60 years at £100 a year dead rent with royalties; B. and C. entered and tried for coal without success: *Held* that there was no guarantee by A. that the subject matter of the agreement had any existence, and that he was entitled to specific performance of the agreement of B. and C. to take the lease.—*Jefferies v. Fairs*, 25 W.R. 227.

- (x.) **Q. B. Div.**—*Forfeiture—Waiver.*—An actual waiver without any express waiver in writing is sufficient to satisfy 22 & 23 Vict. c. 35, s. 6.—*Mills v. Griffiths*, L.J. 45, Q.B. 771.
- (xi.) **Ch. Div. M. R.**—*Lease—Charitable Corporation*, 13 *Eliz. c. 10—Void or voidable*—In 1873 a charitable corporation granted a 99 years' lease at a peppercorn rent, and not in conformity with the Statute against Frauds defeating Remedies for Dilapidations. *Held* that the lease was not void but voidable, and that defendant's title under Statute of Limitations only began to run, when the successors of the original lessors determined to avoid the lease.—*Magdalen Hospital v. Knott*, 25 W.R. 181.
- (xii.) **Ch. Div. V. C. M.**—*Lease—Covenant for renewal.*—Trustees having power to lease at rack rent for 21 years, granted 14 years' lease to W. of premises partly freehold partly leaseholds held by them for 14 years, but renewable by custom on payment of a fine, they also covenanted to use best endeavours to obtain such renewal when they would grant a further lease for 7 years on same terms; the property having increased in value renewal of the lease to the trustees on the former terms was refused. *Held* that the trustees were bound to use their best endeavours to obtain renewal, and if they failed that W. was entitled to further 7 years' lease of the freeholds only.—*Salamon v. Sopwith*, 35 L.T. 463.
- (xiii.) **C. A.**—*Lease—Discrepancy—Habendum and Reddendum—Counterpart.*—Decision of C. P. Div., see Landlord and Tenant (viii.) reversed.—*Burchell v. Clark*, 35 L.T. 690.
- (xiv.) **Q. B. Div.**—*Mining lease—Rates.*—A contract under Rating Act, 1874, s. 8, that tenant under mining lease shall pay all rates must expressly refer to future legislation.—*Duke of Devonshire v. Barrow Hematite Steel Co.*, 35 L.T. 474; 25 W.R. 60.
- (xv.) **Ch. Div. V. C. B.**—*Stall—Exclusive Right of Sale.*—An injunction will lie to restrain breach of a covenant by lessor of a stall in a public building that lessee should have exclusive right of sale of specified goods.—*Altman v. Royal Aquarium Society*, L.R. 3, Ch. D. 228.

Lands Clauses Act :—

- (vii.) **Q. B. Div.**—*Compensation—Arbitration.*—A railway company offered £315 to G. as compensation for lands taken and injuriously affected; G. went to arbitration, and also had the deposit to be paid by the company, on taking possession, assessed by a valuer named by the Board of Trade, at £472: pending the arbitration, the company offered this amount to G., who accepted it; the umpire's award was £447: *Held* that G. was entitled to costs, taxed under Lands Clauses Consolidation Act, 1869.—*Gray v. N. E. Railway Co.*, L.R. 3, Q.B.D. 696; L.J. 45, Q.B. 818; 24 W.R. 758.
- (viii.) **Q. B. Div.**—*Compensation—8 Vict., c. 18, s. 121.*—Justices may award compensation to a lessee whose term has less than a year to run.—*Reg. v. Great Northern Rail. Co.*, L.J. 46, M.C. 4; 35 L.T. 551; 25 W.R. 41.
- (ix.) **Ch. Div. V. C. H.**—*Compensation.*—Money paid into Court by Railway Company for purchase of Corporation Lands, ordered to be applied to redemption of mortgages of tolls and bonds of the Corporation affecting their lands.—*In re Derby Municipal Estates*, L.R. 3, Ch. D. 289; 24 W.R. 729.

- (x) **Ch. Div. V. C. B.**—*Compensation*—"Improvements."—Compensation money in Court may be expended in additions to house, part of the settled estate.—*Re Speers Trusts*, L.R. 3, Ch. D. 262; 24 W.R. 880.
- (xi) **Ch. Div.**—*Compensation—Investment*.—A petition for investment in land of £50 in Court, application to dispense with usual order of reference as to title was refused, but leave was given to apply in chambers.—*Re Blomfield*, 25 W.R. 37.
- (xii) **Ch. Div. V. C. B.**—*Payment out to Trustees*.—Proceeds of land taken by a Railway Company were ordered to be paid out of Court to trustees for sale, the cestui que trust being an infant.—*In re Gooch's Estate*, L.R. 3, Ch. D. 742.

Leases and Sales of Settled Estates Acts:—

- (iii) **Ch. Div. V. C. H.**—*Affidavit of no settlement of interest of a married woman*, Held not to be necessary.—*In re Standish's Settled Estates*, 25 W.R. 8.
- (iv) **C. A.**—*Lease*.—The Court, affirming decision of M.R., refused, having regard to the construction of a will and the nature of the property, to authorise a lease dispensing with concurrence of a trustee who had a beneficial interest.—*Taylor v. Taylor*, L.R. 3 Ch. D. 145; L.J. 45 Ch. 848; 35 L.T. 451.

Licensed House:

- (ii) **App. Div. Ct.**—*Gaming*—85 & 86 Vict. c. 94.—A private friend entertained by the landlord was found playing cards for money after closing hours; conviction for being on the premises after closing hours under Licensing Act, 1872, s. 25, was quashed.—*Cooper v. Osborne*. 35 L.T. 847.

Lord Mayor's Court:—

- (iv) **App. Div. Ct.**—*Appeal—Jurisdiction*.—Appeal from judgment upon demurrer from the Mayor's Court lies not to this Court, but to the Court of Appeal.—*Le Blanche v. Reuter's Telegram Co.*, L.R. 1 Ex. D. 408; 25 W.R. 115.
- (v) **Ch. Div. V. C. H.**—*Foreign Attachment*.—*Bankruptcy Act*, 1869, s. 12—A writ of foreign attachment in Mayor's Court, perfected by judgment signed subsequently to filing of liquidation petition by debtor, gives the creditor a security within Bankruptcy Act, 1869, s. 12.—*Re London Cotton Mills Co.*, 25 W.R. 109.

Lunacy:—

- (v) **L. J. J.**—*Costs*.—A petition for inquiry was presented by a stranger; in pursuance of the visitor's report an inquiry was held, and jury returned verdict of sound mind; the Court, inasmuch as the inquiry was justified by the visitor's report, but being of opinion that the matter had been set on foot by petitioner's solicitor for his own profit, refused to make any order as to costs.—*In re S.*, 25 W.R. 133.
- (vi) **L. J. J.**—*Jurisdiction—Trustee—Vesting order—Real Estate in Ireland*.—On a petition presented to L.C. and Ch. Div., this court made an order for the appointment of new trustees in the place of a lunatic trustee, and for vesting in such new trustees real estate in England and Ireland.—*Re Lamotte*, 25 W.R. 149.

Malicious Prosecution:—

- (i) A box of defendant's was missed by him at Oxford railway station, and discovered at Reading in apparent possession of plaintiffs in a railway carriage; plaintiff travelled with defendants to London and there gave them in charge: Held that the question whether an apprehension without warrant under 24 and 25 Vict., c. 96, s. 103, is "immediate" is for the jury.—*Griffiths v. Taylor*, 25 W.R. 196.

Master and Servant :—

- (v.) **Ex. Div.**—*Negligence—Defective Machinery.*—A chain, originally badly welded and so worn as to be unfit for use, broke and injured a servant using it: *Held* that the master was guilty of negligence for not examining, and liable for the injury.—*Murphy v. Phillips*, 35 L.T. 477; 24 W.R. 647.

Metropolitan Management :—

- (i.) **App. Div. Ct.**—*Old Building—Additions.*—18 & 19 Vict. c. 122.—Appellant taking down an external wall of an old building containing more than 216,000 cubic feet, made an addition in itself containing less than 216,000: *Held* that such addition was within Metropolitan Building Act, 1855, s. 27, and that a magistrate's order to divide the old building from the new was good.—*Scott v. Legg*, 35 L.T. 487.
- (ii.) **Ch. Div. V. C. M.**—*Party Wall.*—In a case of dispute as to a party wall, the Court has power under the Common Law Procedure Act, 1854, s. 12, and the Metropolitan Building Act, 1855, s. 85, to appoint a third surveyor where the two surveyors appointed by the parties refuse, notwithstanding a pending action to restrain obstruction of ancient lights in the party wall.—*Ex parte McBryde*, 35 L.T. 543.
- (iii.) **C. A.**—*Paving Rate.*—The expenses of paving one side of a new street cannot, under the Metropolitan Management Acts, be charged exclusively on owners of houses on that side.—*Vestry of Mile End Old Town v. Guardians of Whitechapel*, L.R. 1, Q.B.D. 680; 35 L.J. 354; 24 W.R. 719.
- (iv.) **App. Div. Ct.**—*Sewer—New Street.*—Respondent, with sanction of Metropolitan Board of Works, laid down sewer under road in which he owned houses, being a "new street" within Metropolitan Management Amendment Act, 1862: *Held* that he was not liable to contribute to cost of a sewer laid down by appellants in place of such sewer.—*Fulham Board of Works v. Goodwin*, L.R. 1, Ex. D. 400.
- (v.) **App. Div. Ct.**—*Sewer—Street.*—Streets were laid out on appellant's land since 1862, and sewers were laid down thereunder: *Held*, on the construction of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict., c. 102), ss. 52, 53, 112, an apportionment, not providing that part of the cost should be paid out of the district sewers rate, was invalid.—*Sheffield v. Fulham Board of Works*, L.R. 1, Ex. D. 395.
- (vi.) **Q. B. Div.**—*Valuation List.*—Deviation from times fixed by Valuation (Metropolis) Act, 1869, does not render the valuation list invalid.—*Regina v. Ingall*, 35 L.T. 552; 25 W.R. 57.
- (vii.) **Q. B. Div.**—*Vestry—Duty—Metropolis Local Management Act, 1855.*—Defendants refused to collect or remove dirt from plaintiffs' workhouse, built under 22 Geo. III., c. 56: *Held* that defendants were liable for misfeasance, and that plaintiffs were entitled to recover cost of employing persons to remove it.—*Holborn Guardians v. St. Leonards' Vestry, Shoreditch*, L.J. 46, Q.B. 86; 35 L.T. 400; 25 W.R. 40.

Mines :—

- (ii.) **H. L.**—*Adjacent owners.*—Respondent so worked his mine that rainfall and surface water flowed through fissures into appellant's mine which was adjacent to and at lower level than respondent's mine. *Held* that respondent was not liable for damage done by natural user of his mine.—*Wilson v. Waddell*, 35 L.T. 639.

Mortgage :—

- (vi.) **Ch. Div. M. R.**—*Construction of deed.*—Bonds of a public loan were issued by railway contractors at £7 per cent. and redeemable by drawings. *Held*, on the construction of the mortgage deed, that the holders of bonds which had been drawn but not redeemed were not entitled to recover interest from time of drawing till redemption.—*Gordillo v. Weguelin* 35 L.T. 609,

- (vii.) **C. J. B.**—*Equitable Mortgage—Misdescription—Rectification.*—A. signed a document intending to create an equitable charge on three leasehold houses, by mistake therein described as comprised in a certain lease which in fact comprised only one of them; on the bankruptcy of A., *Held* that mortgagees were entitled to have the document rectified. *Ex parte National Provincial Bank of England, Re Boulter*, L.J. 46, Bpcy. 11; 35 L.J. 673; 25 W.R. 100.
- (viii.) **C. A.**—*Mortgagee in possession—Account—Statute of Limitations.*—In 1860 the mortgagee of a life interest entered into possession, in 1866 the tenant for life disappeared; in 1874 the remainderman presented a petition for account of rents from 1866 to 1874; a presumption that tenant for life died in 1866 was established. *Held* that petitioner was only entitled to claim 6 years arrears of rents.—*Hickman v. Upsall*, 25 W.R. 175.
- (ix.) **Ch. Div. M. R.**—*Power of Sale.*—The usual proviso in a power of sale as to inquiry will protect a bona fide purchaser for value even if the power is exercised after the security has been satisfied.—*Dicker v. Angerstein*, L.R. 8, Ch. D. 600; L.J. 45, Ch. 754; 24 W.R. 844.
- (x.) **Ch. Div. V. C. H.**—*Priority.*—First mortgagee purchased equity of redemption of mortgaged premises from trustee in bankruptcy of mortgagor: *Held*, upon construction of the deed of assignment, that it was the intention of the first mortgagee to preserve the priority of his charge as against a second mortgagee, and that *Toulmin v. Steere*, 3 Mer. 210, did not apply.—*Adams v. Angell*, L.J. 46, Ch. 54; 26 W.R. 139.

Municipal Law :—

- (iii.) **C. A.**—*Alderman—Interest in Contract.*—An alderman supplied goods to the Town Council, and after termination of the contract acted as alderman without re-election: *Held* that the contract was within Municipal Corporations Act, 5 & 6 Wm. IV., c. 76, s. 28, but that he did not incur a penalty, under s. 53, for so acting.—*Lewis v. Carr*, L.R. 1, Ex. D. 484.
- (iv.) **App. Div. Ct.**—*Construction of Statute.*—Appellant had built a chimney within borough of H., not in accordance with 3 & 4 Vict., c. 85, s. 6; a subsequent local Act prescribed other directions regarding chimneys: *Held* that the local Act had not repealed the former general Act, and that appellant had been rightly convicted thereunder.—*Hill v. Hall*, L.R. 1, Ex. D. 411; L.J. 45, M.C. 150.
- (v.) **Ch. Div. M. R.**—*Construction of Statute—Private Road—Oldham Improvement Act, 1865.*—11 & 12 Vict. c. 63.—28 & 29 Vict. c. 75.—38 & 39 Vict. c. 55.—The Corporation of Oldham, under their Local Act, broke up plaintiff's private road for purpose of constructing a sewer: *Held* on the construction of the Local Act and of the Statutes, above referred to, that plaintiff's road was a street, and that the Corporation were entitled to break it up and lay down sewers thereunder.—*Taylor v. Corporation of Oldham*, 35 L.T. 696; 25 W.R. 178.
- (vi.) **App. Div. Ct.**—*Construction of Statute.*—"Town"—Local Act, passed in 1822, prohibited sale of fish within the "town" of R., except in the market: respondent sold fish in a thoroughfare, the site of which in 1822 was in the fields: *Held* that an offence against the Act had been committed.—*Collier v. Worth*, L.R. 1, Ex. D. 464; 35 L.T. 345.
- (vii.) **Q. B. Div.**—*Rate—Railway.*—By a Local Act, Commissioners of W. had power to levy improvement rate within a district less than the Municipal borough afterwards constituted, and it was thereby provided that railway premises should be rated at one quarter of net value; by the Public Health Acts, 1872 & 1875, the whole Municipal borough was formed into one sanitary district: *Held* that the assessment must be according to the Local Act.—*London & N. W. Rail. Co. v. Overseers of Walsall*, 35 L.T. 626.

- (viii.) **Q. B. Div.—Rates—Railway.**—A partial exemption from payment of borough improvement rates conferred by a Local Act, is not affected by subsequent Public Acts unless such intention is expressed or implied therein.—*Regina v. London & N. W. Rail. Co.*, 25 W.R. 59.

New South Wales, Law of:—

- (i.) **P. C.—Land Act, 1861—Crown Grant.**—A grant under the Crown Lands Alienation Act, 1861, may be made to an infant.—*O'Shanassy v. Joachim*, L.R. 1, App. 82; L.J. 45, P.C. 43; 34 L.T. 265; 24 W.R. 791.

New Zealand, Law of:—

- (i.) **P. C.—Waste Lands Act, 1865.**—*Held* that under the law of New Zealand a purchaser of waste lands who had entered his application before the price was raised by order of the Governor in Council, had not a vested right to have the land allotted at the lower price.—*Bell v. Receiver of Land Revenue of Southland*, L.R. 1, App. 707; L.J. 45, P.C. 47; 34 L.T. 629.

Nuisance:—

- (v.) **Ex. Div.—Conviction—Abatement—Prohibition.**—On 11th March, 1871, justices made order of abatement under Nuisances Removal Act, 1855, s. 12, on E. to cease from sending forth black smoke from a chimney: on 14th March, 1874, a further order was made under the same section for discontinuance and prohibition of nuisance; E. was, on evidence regarding emission of smoke one day, convicted of disobedience to both orders: *Held* that one of the convictions must be quashed.—*Barnes v. Edleston*, L.R. 1, Ex. 67; L.J. 45, M.C. 162; 34 L.T. 497.
- (vi.) **App. Div. Ct.—Public Sewers.**—Two separate drains of the Company discharged into public sewer liquid impregnated with muriatic acid and sulphur respectively; the combination produced sulphuretted hydrogen, the escape of which was injurious to public health: *Held* that a nuisance within 18 and 19 Vict., c. 121, s. 8, had been created by act of the Company, and that complaint of the same might be made by the Corporation, though they had not properly trapped and flushed the sewer as required by Local Act.—*St. Helen's Chemical Co. v. Corporation of St. Helen's*, L.R. 1, Ex. D. 196; L.J. 45, M.C. 150; 34 L.T. 397.
- (vii.) **Ch. Div. V. C. H.—Information—Injunction—Corporation.**—The Attorney-General may take proceedings in cases of public nuisance at relation of any person whether or not resident near or interested in the property where the nuisance exists, also held that public corporate bodies making no profits are liable for nuisance.—*Att.-Gen. v. Mayor, &c., of Basingstoke*, L.J. 45, Ch. 726; 24 W.R. 816.

Partition:—

- i.) **Ch. Div. V. C. H.—Sale—Affidavit**—31 & 32 Vict. c. 40, s. 4.—Where plaintiff asked for and defendant consented to a sale, no defence having been delivered: *Held* that the statement of claim must be verified by affidavit.—*Senior v. Hereford*, 25 W.R. 223.

Partnership:—

- (ii.) **Ch. Div. M. R.—Loan or partnership**—"Contract in writing," 28 & 29 Vict. c. 36—*Construction of contract.*—A. & Co. obtained an advance from B. under an agreement which was embodied in a draft deed never executed providing that loan should be secured by covenant of members of the firm and repaid at end of partnership term, and that B. might inspect books, &c., and receive a proportion of yearly profits; the firm also obtained an advance from C. under a similar agreement which was executed: *Held* that B. was not protected by any "contract in writing," within Bovill's Act, and that, on the construction of the agreements, the relation of partnership, not of debtor and creditor, had been established between the firm and B. & C.—*Pooley v. Driver*, 25 W.R. 162.

Patent:—

- (vi.) **H. L.**—*Combination*.—The invention of a new and beneficial combination and application of old machinery may be protected by patent.—*Harrison v. Anderston Foundry Co.* L.R. 1 App. 574.
 - (vii.) **C. A.**—*Foreign Patent*.—English letters patent granted for a foreign invention after a foreign patent has been obtained, are to be taken as granted on the day of the date, not at the time of sealing: decision of M.R., see Patent (i.), affirmed.—*Holste v. Robinson*, L.R. 4, Ch. D. 9; L.J. 46, Ch. 1; 35 L.T. 457.
 - (viii.) **Ch. Div. V. C. B.**—*Infringement—Injunction*.—Plaintiffs were patentees of an invention for stopping bottles of aerated waters: defendant subsequently took out a patent for an invention which attained precisely the same result by slightly different means: *Held*, upon the facts of the case, that the defendants' invention was a colourable imitation and infringement of plaintiffs' patent, and injunction granted.—*Barrett v. Vernon*, 35 L.T. 755.
 - (ix.) **C. A.**—*Infringement—Interim Injunction*.—Where defendant had recently commenced his trade, and it appeared that plaintiff had a strong case, and that the usual practice of the Court in ordering defendant to keep account of profits, could effectually compensate plaintiff if successful: *Held* that an interim injunction might be granted, on plaintiff's undertaking as to damages.—*Plimpton v. Spiller*, 35 L.T. 656; 25 W.R. 152.
 - (x.) **C. A.**—*Infringement—Prior User*.—Where defendant pleads prior user he cannot be ordered to furnish further particulars as to such user than are required by Patent Law Amendment Act (15 & 16 Vict., c. 83), s. 41.—*Flower v. Lloyd*, L.J. 45, Ch. 746; 35 L.T. 454; 25 W.R. 17.
 - (xi.) **H. L.**—*Infringement—Manufacture for Crown*.—Defendants, in executing Government contract for manufacture of rifles, infringed plaintiff's patent for breach-action, and lock: *Held* that defendants were not exempt as agents or servants of Crown from liability in respect of the infringement.—*Dixon v. London Small Arms Co.*, L.R. 1, App. 632; 35 L.T. 559; 25 W.R. 142.
 - (xii.) **Q. B. Div.**—*Licence—Ambiguity—Evidence of Intention*.—Plaintiff by deed granted to defendant license to use a patent for breach-loading rifles, on payment of a royalty for every rifle manufactured under the license; at the time of the execution of the deed the exemption of the Crown from royalties was supposed to extend to Government Contractors, but, on decision of *Dixon v. London Small Arms Co.*, plaintiff sought to recover royalties for rifles manufactured for the Government; the jury found that such was not defendant's intention to the knowledge of plaintiff: *Held* that on the construction of the deed there was a latent ambiguity admitting extrinsic evidence of intention, and that plaintiff could not recover.—*Rodan v. London Small Arms Co.*, 35 L.T. 505.
 - (xiii.) **Ch. Div. M. R.**—*Specification*.—Omission of part of provisional from final specification, is notice of abandonment of such part which any one is at liberty to work and obtain patent for.—*Stones v. Todd*, L.R. 4, Ch. D. 58; L.J. 46, Ch. 32; 35 L.T. 660; 25 W.R. 38.
- Poor Law:—**
- (iii.) **Q. B. Div.**—*Lunatic—Maintenance*.—A retrospective order may be made for payment of maintenance of a pauper lunatic for more than one year.—*Finch v. Guardians of York Union*, L.R. 2, Q.B.D. 15; 35 L.T. 708; 25 W.R. 42.
 - (iv.) **App. Div. Ct.**—*Ra'cability—Lead Mine*.—37 & 38 Vict. c. 54.—A Company held under a lease comprising land and works in Union A., and a mine and works in Union B.: the ore being crushed and washed was taken by a tramway to a smelting-house, half a mile distant in Union A., and held under the same lease: *Held* that all the crushing, washing, and smelting

works were within the Rating Act, 1874, s. 7, and that a deduction must be made in respect of gross dues in respect of premises in Union A., to obtain rateable value of mine in Union B.—*Snailbeach Mine Co. v. Forden Guardians*, 35 L.T. 514.

- (v.) **C. A.**—*Rateability—Mooring*s.—*Held* that the grantees of certain permanent moorings constructed and used by them subject to regulations of the Thames Conservancy, had exclusive occupation thereof, and were liable to pay rates.—*Cory v. Bristow*, L.J. 45, M.C. 145; 33 L.T. 624.
- (vi.) **Q. B. Div.**—*Rateability—Railway*.—Appellants' line ran through a district in which there were other competing lines; their gains in the parish of I. part of the district did not cover expenses: *Held* that appellants were rightly rated on basis of enhanced value by traffic on other parts of the line.—*London and N. R. Rail. Co. v. Churchwardens of Irthlingboro'*, 35 L.T. 327.
- (vii.) **Q. B. Div.**—*Rateability—Sporting Rights—Reservation*—37 & 38 Vict., c. 54.—A. granted lease of land, excepting all manner of game, &c., with liberty of hunting, fowling, and fishing during the term: *Held* that the sporting rights were severed from the occupation, and rateable.—*Rogers v. St. German's Union*, 35 L.T. 332.

Practice :—

- (lxxii.) **Ch. Div. M. R.**—*Account*.—An accounting party cannot refuse to be sworn on ground of insufficient notice of points of examination, but he may on such ground refuse to answer.—*Meyrick v. James*, L.J. 46, Ch. 38.
- (lxxiii.) **C. A.**—*Appeal—Divorce Suit*.—Appeal from order of a single judge in a divorce suit refusing new trial lies to the Full Divisional Court whose decision is final.—*Westhead v. Westhead and Gordon*, 25 W.R. 85.
- (lxxiv.) **C. A.**—*Appeal—Evidence—Costs—Ord. 58, r. 12*.—The Court of Appeal in this case acted on its own view of conflicting evidence, and reversed the decision of the Court below on a question of fact; fresh evidence to correct this apprehension, arising from double signification of a word, is admissible at any stage of the proceedings: costs of transcribing and printing, but not of taking, shorthand notes of evidence in Court below allowed.—*Higsby v. Dickinson*, L.R. 4, Ch. D. 24; 35 L.T. 679; 25 W.R. 89, 122.
- (lxxv.) **C. A.**—*Appeal—Time*.—Where several claims are joined in one application, an appeal from a partial refusal must be brought within 21 days from the refusal, not from the perfecting of the order. —*Trail v. Jackson*, L.R. 4 Ch. D. 7; L.J. 46, Ch. 16; 25 W.R. 36.
- (lxxvi.) **C. A.**—*Appeal—Time—Ord. 58, rr. 8, 9, 15*.—An appeal must be set down before day named for hearing in the notice of appeal: an appeal from a winding-up order must be brought within three weeks of the order.—*Re National Funds Assurance Co.*, 35 L.T. 689; 25 W.R. 151, 153.
- (lxxvii.) **C. A.**—*Appeal—Ord. 58, r. 15*.—Special leave to appeal after time expired will not be granted on *ex parte* application.—*Evennett v. Lawrence*, 25 W.R. 107.
- (lxxviii.) **C. P. Div.**—*Appeal from Chambers—Time*.—Ord. 54, r. 6.—This rule is peremptory, so that there is no appeal from chambers after eight days from decision, even though no Court has been sitting, unless the time is enlarged under Ord. 57, r. 6.—*Crom v. Samuel*, L.R. 2, C.P.D. 21; L.J. 46, C.P. 1; 35 L.T. 423; 25 W.R. 45.
- (lxxix.) **C. A.**—*Appeal from Chambers—Time*.—Ord. 54, r. 6.—The motion by way of appeal must be made within eight days of decision appealed from.—*Lee v. Hulsis*, 35 L.T. 690.

- (lxxx.) **Q. B. Div.**—*Appeal from Justices—Jurisdiction.*—An application under 20 & 21 Vict. c. 43, s. 5, for rule to Justice to state case is properly made to Q. B. Div., not to App. Div. Ct.—*Ex parte Longbottom*, L.J. 45, M.C. 168.
- (lxxxi.) **Q. B. Div.**—*Appeal from Justices—Time.*—The time for giving notice of appeal under Public Health Act, 1875, s. 269 from order of justices runs from date of order, not of service of order.—*Regina v. St. Alban's Sanitary Authority*, 35 L.T. 362.
- (lxxxii.) **C. P. Div.**—*Attachment—Ord. 45, r. 2.*—A notice to treat under Lands Clauses Act, 1845, is not a "debt owing or accruing" which can be attached.—*Richardson v. Elmit*, L.R. 2 C.P.D. 9.
- (lxxxiii.) **Ch. Div. V. C. M.**—*Attachment—Contempt of Court.*—Any conduct which renders it impossible for litigation to be carried on properly and fairly is in contempt of the Court before which such litigation is pending.—*Republic of Costa Rica v. Erlanger, Ex parte Edwards*, 25 W.R. 752.
- (lxxxiv.) **C. A.**—*Attachment—Costs.*—Held that a person committed for contempt and ordered to be released on payment of costs is not in prison for debt within Debtor's Act, 1869, nor entitled to be released until he has paid such costs.—*Re M.*, L.J. 46 Ch. 24.
- (lxxxv.) **Ch. Div. V. C. M.**—*Charging order—1 & 2 Vict. c. 119, s. 14.*—Stock of a company standing in trustee's name is not affected by charging order in respect of trustee's own debt.—*Re Blakely Ordnance Co.* 35 L.T. 617; 25 W.R. 111.
- (lxxxvi.) **Ch. Div. V. C. M.**—*Consent order—Counsel.*—Held that defendant having understood an order made in his presence, by consent of his counsel, the order would not be set aside.—*Holt v. Jesse*, L.R. 3, Ch. D. 177; 24 W.R. 879.
- (lxxxvii.) **Ex. Div.**—*Costs—Application after Trial—Ord. 55.*—Held affirming decision of Ex.Div. (35 L.T. 671) that no order as to costs can be made on application made after the trial either to court or in chambers, even on fresh facts discovered since the trial except to Divisional Court.—*Baker v. Onkes*, 25 W.R. 220.
- (lxxxviii.) **P. D. & A. Div.**—*Default of Pleading.*—Ord. 29, r. 2, as to entering final judgment on default of pleading does not apply to Admiralty actions in rem.—*The Sfactoria*, 35 L.T. 431; 25 W.R. 62.
- (lxxxix.) **Ch. Div. V. C. H.**—*Default of pleading.*—On application for dismissal for want of prosecution, under Ord. 19, r. 1, the court will be guided by the circumstances of the case.—*Higginbotham v. Aynsley*, L.R. 3 Ch.D. 288; 24 W.R. 782.
- (xc.) **Ch. Div. V. C. H.**—*Discontinuance.*—Ord. 23.—Form of writ of *fi. fa.* for recovery of defendant's costs where plaintiff has given notice of discontinuance.—*Bolton v. Bolton*, L.R. 3, Ch.D. 276; 35 L.T. 358; 24 W.R. 663.
- (xci.) **Ch. Div. V. C. H.**—*Discovery.*—Plaintiff having ascertained that defendants had shipped goods bearing trade marks imitated from those of plaintiff, brought action against defendants for discovery of names of the consignors: demurrer on the ground that the defendants had not sufficient interest, but were in the position of mere witnesses in intended litigation against the consignors, was overruled.—*Orr v. Diaper*, L.R. 4 Ch. D. 92; L.J. 46, Ch. 41; 35 L.T. 468; 25 W.R. 23.
- (xcii.) **Ex. Div.**—*Discovery—Attachment.*—Ord. 31, r. 20, as to attachment for disobedience of order for discovery does not apply to order for statement of names of partners under Ord. 16, r. 10, or for account under Ord. 15, r. 1.—*Pike v. Keene*, 35 L.T. 341; 24 W.R. 322.
- (xciii.) **Ch. Div. V. C. B.**—*Discovery—Interrogatories—Specific performance.*—In action for specific performance of agreement for sale it was stated

- that plaintiffs, the purchasers, were trustees. *Held* that interrogatories delivered by defendant as to the terms and nature of the trust must be struck out as irrelevant.—*Mansfield v. Childerhouse*, L.R. 4, Ch. D. 82; L.J. 46, Ch. 30; 35 L.T. 590; 25 W.R. 68.
- (xciv.) **Ch. Div. V. C. H.**—*Discovery—Reference*.—Where a reference is directed application for discovery necessary for the purpose of the reference must be made to the judge, not to the official referee.—*Koucliffe v. Leigh*, L.J. 46, Ch. 60; 25 W.R. 57.
- (xcv.) **Ch. Div. M. R.**—*Hearing in Camera*.—The Court has no power to try any case in private, even by consent, except cases relating to lunatics or Wards of Court, and cases in which the object would be defeated by public trial, and cases within Divorce Act (20 & 21 Vict. c. 85), s. 22.—*Nagle Gilman v. Christopher*, L.J. 46, Ch. 60.
- (xcvi.) **Ch. Div. M. R.**—*Interlocutory Application—Costs*.—Costs of applications ordered to stand over on remand until trial, follow event of trial without special directions.—*Hodges v. Hodges*, 25 W.R. 162.
- (xcvii.) **Ch. Div. M. R.**—*Joinder of Causes of Action—Ord. 17*.—A foreclosure action is not an action for recovery of land within Ord. 17, r. 2.—*Tawell v. State Co.*, L.R. 3, Ch. D. 629.
- (xcviii.) **C. P. Div.**—*Leave to sign Judgment*.—Upon an application under Ord. 14, r. 3, the Court has discretion to allow plaintiff to file affidavit in reply to defendant's affidavit.—*Davis v. Spence*, L.R. 1, C.P.D. 719.
- (xcix.) **C. P. D.**—*Leave to Sign Judgment—Affidavit in Reply*.—Ord. 14, r. 3. —Where defendant shows cause by affidavit against an application for leave to enter final judgment, leave may be given to plaintiff to file affidavit in reply.—*Davis v. Spence*, 25 W.R. 229.
- (c.) **C. A.**—*New Trial—Costs—Shorthand Notes*.—Plaintiff having obtained a verdict on two out of three issues, defendants on new trial obtained an entire verdict: *Held* that defendants were entitled under the circumstances to recover costs of first trial relating to issue found in their favour: the master having declined to allow costs of shorthand notes, the Court refused to interfere with his discretion.—*Marcus v. General Steam Navig. Co.*, 35 L.T. 353.
- (ci.) **Q. B. Div.**—*New Trial—Evidence*.—A new trial will not be granted for premature admission of evidence which becomes admissible in the course of the trial.—*Faund v. Wallace*, 35 L.T. 361.
- (cii.) **Ch. Div. V. C. H.**—*Parties—Ord. 16, r. 2*.—Alteration of parties will not be ordered on *ex parte* application.—*Tildesley v. Harper*, L.R. 3 Ch. D. 277.
- (ciii.) **Ch. Div. V. C. H.**—*Parties—Counter-claim—Ord. 16, rr. 17, 18*.—A motion by a person not originally a party, but brought before the Court by counter-claim, to have the counter-claim excluded as against him, was under the circumstances of the case dismissed with costs.—*Dear v. Swoeder*, 25 W.R. 124.
- (civ.) **Ch. Div. V. C. B.**—*Parties—Addition of representation of Heir-at-law and Next-of-kin—Ord. 16, r. 9a*.—In a case where it was extremely difficult to ascertain the heir-at-law and next-of-kin of testator, the Court appointed persons to represent such heir-at-law and next-of-kin before determining the construction of the will.—*Re Peppitt's Estate*, 25 W.R. 211.
- (cv.) **Ch. Div. M. R.**—*Pleading—Ord. 19, r. 17*.—The rule that every allegation of fact not specifically or by necessary implication denied will be strictly enforced.—*Thorp v. Holdsworth*, L.R. 3 Ch.D. 687; 45 L.J.Ch. 406.
- (cvi.) **Ch. Div. V. C. M.**—*Pleading—Amendment*.—One of several defendants who had put in a joint statement of defence, subsequently changed his

- solicitor, applied for leave to amend the joint statement or deliver a fresh separate statement; the new solicitor's affidavit merely stated that H. had additional grounds of defence, but not the nature of the proposed amendments; leave was given accordingly.—*Cargill v. Bower*, L.R. 4, Ch.D. 78; 35 L.T. 621; 25 W.R. 221.
- (cvii.) **Ch. Div. V. C. B.**—*Pleading—Counter-claim.*—Defendant obtained leave to file counter-claim, but through negligence of his solicitor, none was delivered, and a decree was made in his absence. Defendant applied more than six months afterwards, having changed his solicitor, for leave to file counter-claim: leave refused on ground of delay.—*Wilkins v. Bedford*, 35 L.T. 622.
- (cviii.) **Q. B. Div.**—*Pleading—Demurrer.*—The Statute of Limitations must now be pleaded and cannot be raised by demurrer.—*Wakelee v. Davis*, 25 W.R. 60.
- (cix.) **Ch. Div. M. R.**—*Pleading—Demurrer.*—Where defendant obtains extension of time for delivery of defence, he may demur within the extended time.—*Hodges v. Hodges*, L.R. 2, Ch. D. 112; L.J. 45, Ch. 760; 24 W.R. 293.
- (cx.) **C. A.**—*Pleading—Demurrer.*—A. agreed to sell property settled as he and his wife should jointly appoint, and in default of appointment in trust for wife for life, with remainder for A. in fee; the purchase money having been invested in consols in the name of the trustees of the settlement, A. died suddenly before completion; Demurrer of purchaser to statement of claim of widow asking for declaration whether she could be compelled to concur and whether purchaser was entitled to compensation out of purchase money, overruled. Demurrer of widow to statement of claim of purchaser for specific performance subject to widow's interest and compensation in respect of such interest ordered to stand to hearing of action.—*Cox v. Barker, Barker v. Cox*, L.R. 3, Ch. D. 860; L.J. 46 Ch. 62.
- (cxi.) **C. A.**—*Pleading—Ord. 19, r. 23.*—Where a party relies on the illegality or insufficiency of a contract under Statute of Frauds or otherwise he must expressly plead such illegality or insufficiency.—*Clarke v. Callow*, L.J. 46, Q.B. 53.
- (cxii.) **C. A.**—*Pleading—Counter-claim—Ord. 19, r. 3.*—A counter-claim on facts arising after action brought, not expressly so pleaded, may be struck out: where there is no real question between the parties the Court will determine their rights on interlocutory application.—*Ellis v. Munson*, 35 L.T. 585.
- (cxiii.) **C. A.**—*Pleading—Reply.*—Plaintiff may in his reply, instead of by amending statement of claim, allege new facts to support plea by way of confession and avoidance of defence, and may thereby traverse and plead to each defence set up.—*Hall v. Eve*, 35 L.T. 735; 25 W.R. 177.
- (cxiv.) **Q. B. Div.**—*Pleading—Striking out—Pauper Lunatic.*—An action was brought on a justice's order under 17 Vict. c. 97, s. 96, on guardians for maintenance of a pauper lunatic: the Court refused to strike out the guardians' statement of defence, on the ground that the order was final, but held that the proper mode of objecting to the defence was by demurrer.—*Finch v. Guardians of York Union*, 35 L.T. 860.
- (cxv.) **Ch. Div. V. C. B.**—*Pleading—Reply—Striking out.*—In an action where the only question raised by statements of claim and defence was whether or not certain land was included in an agreement, plaintiff by his reply joined issue generally on the statement of defence, and then pleaded fresh matter: Held that such new matter must be struck out as irrelevant to the issue.—*London and St. Catharine Docks Co. v. Metropolitan Rail. Co.*, 35 L.T. 733.

- (cxvi.) **C. A.**—*Pleading—Striking out.*—The whole of a statement of claim of which parts are unintelligible, irrelevant, or offensive, may be struck out under Ord. 16, r. 1.—*Cashin v. Craddock*, L.R. 3, Ch. D. 376; 35 L.T. 452; 25 W.R. 5.
- (cxvii.) **P. D. & A. Div.**—*Pleading—Striking Out—Ord. 19, r. 12.*—Where statement of claim in probate action does not deny defendant's interest the Court will not strike out statement of defence for not alleging defendant's interest.—*Medcalf v. James*, 25 W.R. 63.
- (cxviii.) **Ch. Div. V. C. H.**—*Receiver.*—Where an executor's impending bankruptcy threatened loss to the estate, appointed a receiver before service of writ.—*Re H.'s estate*, L.R. 1 Ch. D. 276; L.J. 45, Ch. 749; 24 W.R. 317.
- (cxvix.) **Ex. Div.**—*Reference.*—A motion to set aside report of official referee must be supported by affidavit.—*Stubbs v. Boyle*, 25 W.R. 184.
- (cxxx.) **Ch. Div. V. C. H.**—*Reference—Account.*—The Court will refer any matter of complicated account, or requiring scientific investigation, of a special or official referee.—*Re Leigh*, L.R. 3, Ch.D. 292; 46 L.J., Ch. 60; 24 W.R. 782.
- (cxxi.) **C. P. Div.**—*Referee.*—The direction in Ord. 86, r. 30, that a referee shall sit de die in diem is directory, and that a person who has acquiesced at the time in non-compliance therewith, cannot move to set aside award on that ground; an application to set aside an award may be made without notice to the other side.—*Robinson v. Robinson*, 35 L.T. 337; 24 W.R. 675.
- (cxixii.) **C. A.**—*Reference—Old Practice.*—Verdict, subject to reference, was taken before, but award made after, Judicature Acts came into operation: *Held* that motion for judgment was not necessary.—*Lloyd v. Lewis*, L.R. 2 Ex. D. 7; 35 L.T. 539; 24 W.R. 102.
- (cxixiii.) **Ch. Div. V. C. M.**—*Service out of Jurisdiction, Ord. 11, 23, 1, 3.*—Defendant not having been served with statement of claim moved to discharge order for service out of jurisdiction on ground that neither indorsement of writ nor affidavit in support of the application showed sufficient cause: *Held* that Court might consider allegations of statement of claim, and refused to discharge order.—*Great Australian Gold Mining Company v. Martin*.—35 L.T. 703.
- (cxixiv.) **C. P. Div.**—*Service out of jurisdiction.*—Leave cannot be given under Ord. 11, in an action for damages for slander depreciating property to serve writ out of jurisdiction.—*Casey v. Arnott*, L.R. 2 C.P.D. 24; L.J. 45 C.P. 3; 35 L.J. 424; 25 W.R. 46.
- (cxixv.) **Ch. Div. V. C. H.**—*Service out of jurisdiction. Ord. 11 v. 1.* Where leave is given to issue writ for service out of jurisdiction the words "by leave of the Court or a judge," may be omitted from the writ and notice, so as to enable plaintiff to proceed without such leave in default of appearance.—*Bacon v. Turner*, L.R. 3 Ch. D. 275; 34 L.T. 647; 24 W.R. 637.
- (cxixvi.) **Ch. Div. V. C. M.**—*Service—Substitution.*—Substitution of notice for service of absconding defendant out of jurisdiction, ordered by advertisement in *London Gazette* and *Times*, and a newspaper the subject of the action.—*Hartley v. Dilke*, 35 L.T. 706.
- (cxixvii.) **P. D. & A. D.**—*Service—Substitution—Probate Action.*—Where husband and wife were both defendants, and husband could not be found, the Court ordered substituted service by advertisement.—*Whitely v. Honeywell*, 35 L.T. 517; 24 W.R. 851.
- (cxixviii.) **C. Div. V. C. M.**—*Special Case.*—Where a special case was stated as to the effect of an assignment of a contingent interest: *Held* that the assignment was of a mere possibility, and that no order ought to be made. *Bright v. Tyndall*, 25 W.R. 109.

- (cxxxix.) **C. A.**—*Special Case—Trial of Question at Law—Order 34, r. 2.*—Decision of Q. B. Div., see Practice (lxv.) affirmed.—*Metropolitan Board of Works v. New River Co.*, 25 W.R. 175.
- (cxxx.) **C. A.**—*Stay of Proceedings—Costs.*—Plaintiff, whose furniture had been seized for non-payment of costs, applied for stay of proceedings pending appeal to House of Lords, and that sheriff might be ordered to withdraw on payment of costs into Court: *Held* that plaintiff must pay whole costs to defendant's solicitor, on his undertaking to refund if appeal should succeed, and also costs of sheriff and of this application.—*Morgan v. Elford*, 25 W.R. 136.
- (cxxxii.) **Ex. Div.**—*Transfer.*—An action for breach of contract, and fraudulent misrepresentation with regard thereto, was brought in Ex. Div.; and a cross action for specific performance of the same contract was brought in Ch. Div.; the Court ordered the first action to be transferred to Ch. Div.—*Holmes v. Hervey*, 35 L.T. 600; 25 W.R. 80.
- (cxxxiii.) **P. D. & A. Div.**—*Trial—Ord. 36, r. 1.*—The Court will generally adhere strictly to the rule that causes shall be tried in Middlesex, unless another county is named in the statement of claim.—*Ridge v. Ridge*, 35 L.T. 428.
- (cxxxiiii.) **C. A.**—*Trial by Jury—Chancery Action.*—The trial by jury of an action in Ch. Div. must be at the sittings in London or Middlesex before a judge of a Common Law Div., or at assizes.—*Warner v. Murdock*, 35 L.T. 748; 25 W.R. 207.
- (cxxxv.) **Ch. Div. V. C. H.**—*Trial—Jury.*—The judge has absolute discretion, under Ord. 36, r. 26, to order a Chancery action to be tried by himself without a jury: where the case rests on voluminous documentary evidence the case ought not to be tried by a jury.—*Garling v. Royds*, 25 W.R. 123.
- (cxxxvi.) **Ch. Div. V. C. H.**—*Writ—Amendment.*—With the sanction of A. G. an action may by amendment of writ and statement of claim be turned into an information and action, without prejudice to a pending motion in the action.—*Caldwell v. Pagham Harbour Reclamation Co.*, L.R. 2, Ch.D. 221; L.J. 45, Ch. 796; 24 W.R. 690.
- (cxxxvii.) **Ch. Div. V. C. H.**—*Writ—Indorsement.*—Executor advertised part of testator's property for sale; A. being interested beneficially, brought action for administration only: *Held*, on *ex parte* application, that A. might amend indorsement of writ by asking for receiver and injunction to restrain sale.—*Colebourne v. Colebourne*, L.J. 45, Ch. 749; 24 W.R. 235.

Principal and Agent:—

- (vii.) **C. A.**—*Commission.*—S. employed B. & Co. to effect insurances on his ships: in their accounts they charged full premiums, but retained for themselves 5 per cent. as brokerage, and a further 10 per cent. discount for ready money: *Held* that the allowances were usual, and that S., not having inquired into the terms on which S. & Co. effected the insurances, could raise no objection.—*Baring v. Stanton*, L.R. 3, Ch.D. 502.
- (viii.) **C. A.**—*Factor—Set-off.*—Where an agent is intrusted with goods for sale, and no limitation of his authority is disclosed to buyer, a debt due from agent to buyer may be set-off against principal's claim notwithstanding agreement of agent with principal not to sell in his own name.—*In re Henley, Ex parte Dixon*, 35 L.T. 641; 25 W.R. 105.

Principal and Surety:—

- (iii.) **C. A.**—*Discharge.*—A surety is discharged by creditor releasing a partial security for principal's debt.—*Polak v. Everett*, L.R. 1, Q.B.D. 669; 35 L.T. 350; 24 W.R. 689.
- (iv.) **C. A.**—*Discharge.*—*Held*, reversing decision of C. P. Div., that where there is one entire contract for performance by principal of several acts at distinct times, time given to principal with regard to any one of such acts

does not discharge surety from all liability; the obligation cannot be renewed by any subsequent act to which he is not a party.—*Croydon Commercial Gas Co. v. Dickinson*, 25 W.R. 157.

- (v.) **C. A.—Liability—Bankruptcy of principal**—Surety guaranteed payment of £7000, with proviso limiting liability to £1300; debtor paid off £1000 and then filed petition for liquidation, in which obligee proved and received a dividend on £6000; more than £13,000 still remained unpaid: *Held* that surety was not entitled to deduct a rateable proportion of dividend, was liable for whole £1,800.—*Ellis v. Emmanuel*, L.R. 1, Ex. D. 157; L.J. 46, C.P. 25; 34 L.T. 553; 24 W.R. 832.

Probate:—

- (ix.)—**P. D. A. Div.—Attestation**.—Where will had no attestation clause but at foot thereof were the words “signed in the presence of” before the names of the witnesses, the testator's name being written below: *Held* that the will might be admitted to probate.—*In the goods of Jones*, 25 W.R. 215.
- (x.)—**P. D. & A. Div.—Copy will**.—The copy of a will may, with the consent of parties interested in intestacy be admitted to probate.—*In the goods of Entichnap*,—35 L.T. 427.
- (xi.)—**P. D. & A. Div.—Informal documents**.—Where four testamentary documents were found after death, some of which were informal and imperfectly attested but not inconsistent with each other: *Held* that they might all be admitted to probate as one will.—*In the goods of Rotton*, 35 L.T. 518.

Public Health:—

- (i.)—**Ex. Div.—Action for penalty**—38 & 39 Vict. c. 55. An action for penalties, under Public Health Act, 1875, Schedule 11, 5, 70, requires consent of A. G.—*Smith v. Fieldhouse*, 35 L.T. 602.
- (ii.) **Ex. Div.—Local Board—Chairman—Acting after Disqualification**.—Defendant, acting as chairman of local board after disqualification, made complaint against plaintiff, the clerk of the board, who resigned, and sued for £50 penalty under Public Health Act, 1875 (38 and 39 Vict., c 55) s. 258: *Held* that plaintiff was not a “party aggrieved,” and could not sue without consent of Attorney-General.—*Rochfort v. Atherley*, L.R. 1, Ex. D. 511.
- (iii.) **C. A.—Local Board—County Court Action—Time**.—*Held* upon the construction of Public Health Act, 1848, ss. 69 129, Administration of Justice No. 2 Act, 1848, s. 11, and Local Government Act, 1858, Amendment Act, 1858, s. 24, that a County Court action by a Local Board for expenses of paving, etc., having been commenced more than six months after cause of complaint arose, could not be maintained.—*Tottenham Local Board v. Rowell*, L.R. 1, Ex. Div. 514; 25 W.R. 135.
- (iv.) **Q. B. Div.—Local Board—Rate—Public Health Act, 1875**.—A local board gave notice of an intended rate under Public Health Act, 1848; before the expiration of the notice that Act was repealed by Public Health Act, 1875, which contained a saving clause as to things “duly done,” and gave similar powers. *Held* that the rate levied in ignorance of the repeal of the Act was valid.—*Regina v. JJ. of West Yorks*, L.R. 1, Q.B.D. 220; L.J. 45, M.C. 97; 35 L.T. 859.

Public Works Loan:—

- (i.) **H. L.—Rate—Mandamus**.—The churchwardens and overseers of W. under 5 Geo. IV., c. 36, borrowed money from the Public Loan Commissioners for the repair of the church: *Held* that a peremptory mandamus commanding a rate to be made for repayment of the money was a decision upon a right, and subject to review, and that inasmuch as more than 20 years had expired since the advance, such rate could not be made.—*Regina v. Churchwardens of All Saints, Wigan*, L.R. 1 App. 611; 35 L.T. 381; 25 W.R. 128.

Queensland, Law of:—

- (i.) **P. C.**—*Gold Fields Act, 20 Vict. c. 29.*—An ordinary quartz reef claim is confined to the particular reef to which the claim refers, and the holder is not entitled to take from any other reef within limits of the claim; discoverers of gold in a new locality within two miles from any known working reef, are entitled to reward claim of 120 ft. in length, and, also, if already holders of miner's rights, to an ordinary quartz claim; claims and interests created before rules of 1868, must be determined by rules of 1866.—*Hollyman v. Noonan*, L.R. 1, App. 595; L.J. 45, P.C. 62.

Railway:—

- (xiii.) **Ex. Div.**—*Carrier.*—An action against a carrier for neglect in delivery of goods after notice of stoppage in transitu is founded on tort.—*Pontifer v. Midland Rail. Co.*, 35 L.T. 706; 25 W.R. 215.
- (xiv.) **App. Div. Ct.**—*Carriers—Special Contr. ct.*—Where a railway company entered into special contract to carry cattle at a low rate, on condition of being liable for negligence only: *Held* that the condition was not unreasonable, and that onus of proof of negligence was on plaintiff—*Harris v. Midland Rail. Co.*, 25 W.R. 63.
- (xv.) **Railway Commissioners—Carriers—Undue Preference—Parcels.**—A railway company had two scales of charges for parcels, one according to weight and distance, and a lower rate according to distance only, but subject to prepayment by stamp and other restrictions: At Dublin the company by agreement with W. paid for carriage to or from the terminus 1d. for each unstamped parcel, and nothing for stamped parcels: in other towns 2d. extra charge was made for collection or delivery of stamped parcels: *Held* on the facts, that the company was not guilty of undue preference.—*Robertson v. Midland G. W. Rail. Co. of Ireland*, 35 L.T. 636.
- (xvi.) **C. A.**—*Negligence.*—*Held*, on the facts, that defendants were not guilty of negligence in having omitted to examine minutely a truck belonging to another company, the breaking down of which on defendant's line caused a collision.—*Richardson v. Great Eastern Rail. Co.*, 35 L.T. 351; 24 W.R. 342.
- (xvii.) **H. L.**—*Negligence.*—If defendants could have prevented accident by reasonable care and diligence, they are not excused from liability by plaintiffs' contributory negligence.—*Radley v. London and N. W. Railway Co.*, 35 L.T. 637; 25 W.R. 147.
- (xviii.) **C. A.**—*Negligence—Insufficient platform.*—Plaintiff, endeavouring to alight from a carriage which had been stopped beyond the station-platform, fell and was injured: *Held* that there was evidence of negligence for a jury.—*Robson v. N. E. Rail. Co.*, L.J. 46, Q.B. 50; 35 L.T. 535.
- (xix.) **C. A.**—*Negligence—Train overshooting platform.*—Decision of Ex. Div., see *Railway Company* (viii.), reversed.—*Rose v North Eastern Rail. Co.*, 35 L.T. 693; 25 W.R. 205.
- (xx.) **C. A.**—*Parliamentary Deposit.*—*Held* that the costs of the solicitor of a railway company incurred subsequently to incorporation, constituted a "debt incurred on account of the promotion of the company," within Abandonment of Railways Act, 1869, s. 5.—*Re Barry Rail. Co.*, 25 W.R. 201.
- (xxi.) **Ch. Div. V. C. H.**—*Parliamentary Deposit.*—The Court has power to order investment in East India £4 per cent. stock of a parliamentary deposit paid into the bank, under 9 & 10 Vict. c. 20. *Re Southwold Railway Bill*, L.R. 1 Ch. D. 667; L.J. 45 Ch. 800; 34 L.T. 56; 24 W.R. 293.

Revenue:—

- (v.) **C. A.**—*Succession Duty.*—A bona fide sale of a reversionary interest does not create a succession within 10 & 17 Vict. c. 51.—*Fryer v. Morland*, L.R. 3 Ch. D. 675; L.J. 45 Ch. 817; 35 L.T., 458; 25 W.R. 21.

School Board:—

- (i.)—**App. Div. Ct.**—*Bye laws*.—A child employed in a workshop at B. attended school 10 hours in the week, as required by the Workshop Regulation Act, 1867 (30 & 31 Vict. c. 146) s. 14. but did not attend during the whole time required by the bye laws of the School Board: *Held* that the bye laws were not contrary to the Act and that there had been a breach of them.—*Bury v. Cherryholm*, L.R. 1 Ex. D. 457; 35 L.T. 403.

Scotland, Law of.—

- (iii.)—**H. L.**—*Marriage—Habit and repute*.—Parties ignorant of an obstacle, afterwards removed, went through a matrimonial ceremony at Glasgow, and believed by themselves and by others to be validly married, lived continuously as husband and wife for years: *Held* that the marriage had been established by habit and repute, without proof of mutual consent by verbal declaration.—*De Thoren v. The Attorney-General*, L.R. 1 App. 866.
- (iv.) **H. L.**—*Reservation of Minerals*.—Grants of land, on the construction of the reservation of minerals clause in each case, held respectively to have, and not to have, secured the right to carry outside minerals under and through the land granted.—*Ramsay v. Blair*, L.R. 1 App. 701.

Settlement:—

- (xvii.) **Ch. Div. V. C. B.**—*Consideration*.—27 Eliz. c. 4.—Testator devised real estate to daughter in fee and declared his wish that on marriage she should settle it on herself for life to her separate use with remainder as she should appoint by will; after her marriage, the property was settled on the wife for life to separate use and without power of anticipation, remainder to husband for life, remainder for children, &c. The husband and wife having mortgaged the property in fee suppressing the settlement, *Held* that the settlement was for valuable consideration and could not be set aside.—*Teesdale v. Braithwaite*, L.R. 4 Ch. D. 85; 35 L.T. 590; 25 W.R. 222.
- (xviii.) **Ch. Div. V. C. H.**—*Equity to Settlement*.—The equity to a settlement of a married woman extends to her children of a former marriage whether or not they are otherwise provided for.—*Conington v. Gilliat*, L.J. 46 Ch. 61; 35 L.T. 736; 25 W.R. 69.
- (xix.) **Ch. Div. M. R.**—*Marriage Articles—Specific Performance*.—By marriage articles wife's parents agreed to appoint to her certain real estate, and the husband, with wife's consent, covenanted to settle the same upon certain trusts: *Held* that the heir of the wife was bound by husband's covenant.—*Lee v. Lee*, 25 W.R. 225.
- (xx.) **C. A.**—*Power of Appointment*.—In a suit to set aside an appointment by a husband under a power in his marriage settlement as being fraudulent in that there was a possibility of benefit to the appointor and to persons not objects of the power, *Held* on the circumstances of the case that the appointment was valid.—*Roach v Trood*, L.R. 3 Ch. D. 429; 34 L.T. 105; 24 W.R. 808.
- (xxi.) **Ch. Div. V. C. M.**—*Rectification—Petition*.—By a marriage settlement real estate was conveyed to trustees their executors, administrators, and assigns upon the usual trusts; it being clear that the fee simple was intended to be passed: *Held*, upon petition under the Trustees Relief Act, that the settlement might be rectified by the insertion of the word "heirs".—*Re Bird's Trusts*, L.R. 3 Ch.D. 214.
- (xxii.) **Ch. Div. V. C. H.**—*Reduction into possession*.—By marriage settlement property was settled both by husband and wife, who afterwards perished without issue in the same ship, and the trusts of the settlement consequently failed: *Held* that each fund must go to the next-of-kin of the settlor thereof.—*Wollaston v. Berkely*, L.R. 2 Ch.D. 213; L.J. 45 Ch. 772; 34 L.T. 171; 24 W.R. 360.

- (xxiii.) **Ch. Div. V. C. B.**—*Satisfaction*.—A., on marriage of his daughter, covenanted to settle a moiety of his property upon trusts declared in her marriage settlement; by his will he left a moiety upon trusts for the benefit of his daughter and her husband and issue, with variations in the trusts and powers: *Held* that the gift by will was in satisfaction of the covenant, and that the daughter and other persons interested must elect between provisions of settlement and of will.—*Russell v. St. Aubyn*, L.R. 2 Ch.D. 898; 35 L.T. 395.

Ships:—

- (xxvi.) **C. A.**—*Charter-party—Construction*.—A charter-party stipulated for cesser of charterer's liability on completion of landing, and provided that master should have a lien of demurrage; the consignees were, in fact, agents of the charterers: *Held* on the construction of the charter-party that the ship owners had no right of action save by enforcement of the lien.—*Sanguinetti v. Pacific Steam Navigation Co.*, 35 L.T. 658; 25 W.R. 150.
- (xxvii.) **C. P. Div.**—*Charter-party—Construction*.—*Held*, on the construction of a charter-party, that a proviso therein contained for cesser of liability of charterers freed them from all liability for acts and defaults of themselves and agents both before and after loading, whether covered by owners' lien or not.—*French v. Gerber*, L.R. 1 C.P.D. 737; L.J. 45 C.P. 880; 25 W.R. 113.
- (xxviii.) **P. D. & A. Div.**—*Collision—Foreign Judgment*.—In an action for collision, a foreign judgment, unless obtained prior to the proceedings in this country, cannot be pleaded as an estoppel.—*The Delta*, L.J. 45 P.D.A. 111; 35 L.T. 376; 25 W.R. 46.
- (xxix.) **P. D. & A. Div.**—*Collision—Measure of Damage*.—In estimating damage a charter-party entered into contingent on arrival of ship at a given time must be taken into consideration, the measure being the freight under the charter-party, less incident expenses.—*The Star of India*, L.J. 45 P.D.A. 102; 35 L.T. 407.
- (xxx.) **P. D. & A. Div.**—*Collision—Inevitable Accident*.—Shipowners are not liable for damage by collision owing entirely to a latent defect in machinery.—*The Virgo*, 35 L.T. 519.
- (xxxi.) **P. C.**—*Collision—Rule of Road—Practice*.—Sailing vessel meeting steamer must keep her course unless in imminent peril: in collision cases in Vice-Admiralty Courts the forms of preliminary Acts in use in the High Court must be used, and evidence taken so far as possible *viva voce*.—*The Norma*, 35 L.T. 418.
- (xxxii.) **P. D. & A. Div.**—*Collision—Sailing Rules—R. 20*.—A ship aground ought to exhibit a light on a mast and have a look-out to warn approaching ships.—*The Thomas Lea*, 35 L.T. 406.
- (xxxiii.) **C. A.**—*Collision—Steering and Sailing Rules*.—The meaning of the terms "crossing ships," "overtaking ships," "approaching ships," within the Steering and Sailing Rules (Merchant Shipping Amendment Act, 1862,) Arts. 14, 16, 17, 20, considered and explained: ships in the English Channel are governed strictly by these rules, not by customs of river navigation.—*The Franconia*, 35 L.T. 721; 25 W.R. 197.
- (xxxiv.) **P. D. A. Div.**—*Compulsory Pilotage*.—Pilotage is compulsory in the Falmouth district.—*The Juno*, L.R. 1 P.D. 135; L.J. 45, P.D.A. 105; 34 L.T. 741; 24 W.R. 901.
- (xxxv.) **C. P. Div.**—*Damage—Limitation of liability*.—The limitation of a shipowner's liability for damage under Merchant Shipping Act, 1862, applies to all cases of improper navigation, and relief on this ground should be claimed in statement of defence, under Judicature Act, 1873, s. 24, subs. 2.—*Wahlberg v. Young*, L.J. 45 C.P. 783; 24 W.R. 847.

- (xxvi.) **P. D. & A. Div.**—*Forfeiture*—17 & 18 Vict., c. 104.—Where a British subject by false representations to customs officers assumes a foreign character for his ship, he commits an offence against Merchant Shipping Act, 1854, s. 103, and thereby renders ship liable to forfeiture.—*The Sceptre*, 35 L.T. 429.
- (xxvii.) **P. D. & A. Div.**—*Foreign ship—Jurisdiction*.—The arrest necessary to give the High Court jurisdiction under 3 & 4 Vict., c. 65, must be in a cause within its jurisdiction; the High Court will on intervention of a foreign consul or by consent of parties, entertain a cause of possession or mortgage of a foreign ship, and may order sale of ship.—*The Evangelistria*, 35 L.T. 410.
- (xxviii.) **Q. B. Div.**—*General average*.—Where in peril ship's furniture is used as fuel for the pumping engine, shipowner is not entitled to general average against owners of cargo, unless there was a reasonable supply of fuel at commencement of voyage.—*Robinson v. Price*, L.J. 46 Q.B. 22; 25 W.R. 112.
- (xxix.) **P. D. & A. Div.**—*Master-dismissal*.—The Court may order dismissed Master to deliver up ship's certificate of registry and papers: *Semble*, the master has no lien on them in case of wrongful dismissal.—*The St. Olaf*, 35 L.T. 428.
- (xl.) **C. P. Div.**—*Master-dismissal*.—Master, in absence of express stipulation in contract of hiring, is entitled to reasonable notice of dismissal.—*Green v. Wright*, 35 L.T. 339.
- (xli.) **C. P. Div.**—*Mortgage—Registration*.—Omission to register a mortgage of a ship postpones it to a subsequent registered mortgage, but affords no answer to first mortgagee's claim to freight as against purchaser of cargo without notice: it is good as against equitable assignment of freight to a third person.—*Keith v. Burrows*, L.R. 1 C.P.D. 722; L.J. 45 C.P. 876; 35 L.T. 508; 25 W.R. 43.
- (xlii.) **C. A.**—*Salvage*.—Held that an agreement between the master of a wrecked ship and the captain of a ship in service of Indian Government, whereby the latter was to receive half the value of cargo salvaged, must be set aside as being exorbitant, and because the captain had no right to impose terms for salvage services.—*The Cargo ex Woosung*, 25 W.R. 1.
- (xliii.) **P. D. & A. Div.**—*Salvage*.—Where, an agreement for salvage and apportionment of salvage money having been made, additional services outside the agreement are rendered, all the salvors, even if not actually engaged in the further operations, are entitled to share in reward.—*The Cadiz and the Boyne*, 35 L.T. 602.
- (xliv.) **P. D. & A. Div.**—*Wages—Waiver of Proceedings*.—Where the proceeds of a ship sold on default of appearance were in Court, it was ordered that all preliminary proceedings in a cause of wages should be waived, and the money paid out of Court.—*The Julina*, 35 L.T. 410.

Solicitor :—

- (iv.) **Ch. Div. M. R.**—*Articled Clerk—Service*.—In 1861 W. was articled to R.; in 1863 his articles were cancelled; in 1865 he re-entered R.'s service and left in 1867, his articles not being cancelled; in 1869 his articles were assigned to L., with whom he remained till five years of service were completed.—Held that there was an implied cancellation of articles in 1867, within 6 & 7 Vict. c. 73, s. 13, and that the different periods might be taken as one period of service.—*Ex parte Williamson*, 35 L.T. 695.
- (v.) **Ch. Div. M. R.**—*Articled Clerk*—6 & 7 Vict. c. 73, s. 3.—Service under parol contract, after expiration of five years' articles, is not service under contract in writing, as required by the statute: and articles cannot be extended or varied by parol.—*Ex parte Adams*, L.R. 4 Ch.D. 49; L.J. 46 Ch. 42; 35 L.T. 751; 25 W.R. 54.

- (vi.) **Ch. Div. M. R.**—*Investment of clients' money—Trust—Estoppel.*—W. entrusted to P., his solicitor, £7700, which he arranged with P.'s clerk should be invested on mortgage of leaseholds at Camden Town, which investment P. subsequently informed him by letter had been made, "as arranged with my clerk;" P. having died insolvent, it was found that no mortgage in favour of W. existed, but that P. had advanced £100,000 in his own name on security of the leaseholds: *Held* that P., and those claiming under him, were estopped from denying that the £7700 was part of the £100,000.—*Middleton v. Pollock, Ex parte Wetherall*, L.R. 4 Ch.D. 49; L.J. 46 Ch. 39; 35 L.T. 608; 25 W.R. 94.
- (vii.) **C. P. Div.**—*Lien.*—H. employed defendant, a solicitor, to take proceedings regarding certain shares and deposited the certificates as security for costs; he afterwards sold the shares with notice of the lien to plaintiff who retained defendant to continue proceedings. *Held* that defendant was entitled notwithstanding acceptance of retainer to hold cheques received by him in exchange for the shares as security for H.'s costs.—*General Share and Trust Co. v. Chapman*, L.J. 46 Ch. 79.
- (viii.) **Ch. Div. M. R.**—*Retainer—Costs—Journey.*—A solicitor retained on behalf of a company took a journey to Paris without special instructions, for the purpose of compromising a suit against the company. *Held* that he could not claim costs and expenses of the journey.—*Re Snell*, 25 W.R. 40.

Tramway :—

- (i.) **Q. B. Div.**—*Superintendence by Road Authority—33 & 34 Vict., c. 78.*—On the construction of the Tramways Act, 1870, ss. 26, 28, and having regard to the mode in which the tramway was laid down, *Held* that plaintiffs, the Road Authority, were not entitled to claim defendants' cost of superintendence and inspection of the work.—*Vestry of St. Luke's v. North Metropolitan Tramways Co.*, L.R. 1 Q.B.D. 760; 35 L.T. 329.
- (ii.) **C. A.**—*Winding-up—Parliamentary deposit.*—An Act of Parliament incorporating a Company provided that the deposit should in the discretion of the Court "if the Company is insolvent and has been ordered to be wound up," be paid to the receiver or liquidator. *Held*, reversing decision of V.C.M., that the discretion did not arise on the winding-up order, nor until calls to the extent of the whole unpaid capital had been made.—*Re Bradford Tramway Co.*, L.R. 4 Ch. D. 18; 25 W.R. 88.

Trustee :—

- (iii.) **C. A.**—*Breach of Trust.*—Testator devised real estate to one of his executors and trustees for life, with remainder over: the devisee committed breaches of trust, and then filed petition for liquidation: *Held* that the life estate being legal was not liable as against the trustee in liquidation, to make good the losses caused by the breaches of trust.—*For. v. Buckley*, L.R. 3 Ch. D. 508; 25 W.R. 170.
- (iv.) **Ch. Div. V. C. H.**—*Trustee Act, 1850.*—The Court will appoint trustees of a will indicating intention to create a trust, though no trustees have been appointed by the testator.—*In re Gillett's Trusts*, 25 W.R. 25.
- (v.) **Ch. Div. V. C. M.**—*Trustee Act, 1850, ss. 2, 10.—Mortgage.*—One of three joint mortgagees (trustees) having gone abroad, the mortgage was transferred by deed: afterwards a new trustee was appointed in his place: *Held* that the former trustee not having conveyed his outstanding legal estate, the Court had jurisdiction under the Trustee Acts to vest the same in the transferee.—*Re Walker's Mortgage Trusts*, L.R. 3 Ch. D. 209.
- (vi.) **C. A.**—*Trustee Act, 1850—Vesting Order.*—Where new trustees had been appointed in the place of a sole trustee who died intestate, and had no legal personal representatives: *Held* (reversing decision of M.R.) that the Court had power under s. 34 to make an order effectually vesting the leaseholds in the new trustees.—*Re Dilg'ish's Trusts*, 25 W.R. 122.

Vendor and Purchaser:—

- (iv.) **Ch. Div. V. C. M.**—*Covenant running with the land.*—A purchaser of land whereon was a well, covenanted to erect a pump and supply water to all houses on vendor's adjoining land: *Held* that the covenant ran with the land, but that independently of that it was binding on a sub-purchaser with notice, also that erection of the pump would be enforced by injunction.—*Cooke v. Chilcott*, L.R. 3 Ch. D. 694.
- (v.) **Ch. Div. V. C. B.**—*Specific performance—Compensation.*—A. agreed to sell property settled as he and his wife should jointly appoint, and in default of appointment in trust for wife for life, with remainder for A. in fee; the purchase money having been invested in consols in names of the trustees of the settlement, A. died suddenly before completion and his widow refused to convey her life interest. *Held* that plaintiff was entitled to conveyance of the property subject to widow's life interest and a lien on the the consols for compensation in respect of such life interest.—*Barker v. Cox*, L.J. 46 Ch. 62; 35 L.T. 662, 695; 25 W.R. 138.
- (vi.) **Ch. Div. V. C. B.**—*Specific performance—Conditions of Sale.*—A condition that property would be conveyed, subject to rights of way, &c., entitles vendors to have the reservation set out on the face of the conveyance.—*Gale v. Squier*, 25 W.R. 226.
- (vii.) **C. A.**—*Statute of Frauds.*—The N. Commissioners agreed to sell land to D.; the contract did not refer to any plan, but the agents who signed it for the parties also signed a memorandum on a plan stating that the land sold was therein coloured red. *Held* that the plan was incorporated in and controlled the contract.—*Nene Valley Drainage Commrs. v. Dunkley*, L.R. 4 Ch. D. 1.

Victoria, Law of:—

- (i.) **P. G.**—*Transfer of Land—Registration.*—A copy of a writ of *fi. fa.* was served under the Transfer of Lands Act, and transfers to B. of lands thereby affected were within 3 months presented for registration; at the expiration of the 3 months no transfer upon a sale under the writ having been left for entry, the registrar registered the transfer to B.; P. afterwards lodged for registration a transfer to himself under an alias writ of *fi. fa.* a copy of which had been served before the expiration of 3 months of the original writ. *Held* that the registrar rightly refused to register P.'s transfer and completed B.'s title.—*Registrar of Titles v. Paterson*, 85 D.T. 642.

Voluntary Gifts:—

- (i.) **Ch. Div. V. C. B.**—Defendant claimed certain bonds alleged to have been given her by B. in his lifetime, and which were found in B.'s safe at his death: *Held* that on the evidence of defendant and her sister, the delivery was proved and the custody of the bonds explained, and that the gift was good. Defendant also claimed a house, for the lease of which proposals had been made and accepted; on the envelope of acceptance testator had written that the lease was to be made out in defendant's name: *Held* that there was no sufficient declaration of trust, and that the claim must be disallowed.—*Bottle v. Knocker*, 35 L.T. 545; 25 W.R. 209.
- ii.) **C. A.**—*Detinue.*—R. delivered without assignment a policy on his life to his mother: *Held* that his administratrix could not maintain action for detinue for the possession of the policy, although the gift did not entitle the mother to claim the policy moneys.—*Rummen v. Hare*, L.R. 1 Ex.D. 169; L.J. 46 Ex. 30; 24 L.T. 407; 24 W.R. 385.

Water:—

- (iv.) **C. A.**—*Overflow—Act of God—Vis Major.*—Extraordinary rainfall caused water stored in artificial pools on defendant's land to swell and carry away embankments, thereby injuring plaintiff's property; there was no negligence in construction or maintenance of embankments. *Held* that

rainfall amounted to *vis major*, and that defendant was not liable in damages.—*Nichols v. Marsland*, L.R. 2 Ex.D. 1; 25 W.R. 725.

- (v.) **H. L.**—*Thames Conservancy Act, 1857, Riparian proprietor.*—Held that the exclusive access of plaintiff to particular land on the bank of a river was a private right within s. 179 of 20 and 21 Vict., c. cxlvii, and that the Conservators could be restrained by injunction from granting a license to construct an embankment obstructing such access.—*Lyon v. Fishmongers' Co.*, L.R. 1 App. 662; 36 L.T. 569; 25 W.R. 165.

Will:—

- (xli.) **Ch. Div. V. C. H.**—*Annuity.*—Testator bequeathed £20,000 to be laid out in purchase of annuity for benefit of A., and if he should alien, then the same should fall into the residue: Held that the restraint on anticipation was void.—*Hunt-Furber v. Foulston*, L.R. 8 Ch.D. 285; 24 W.R. 756.
- (xlii.) **Ch. Div. V. C. M.**—*Annuity.*—Testator directed executors to purchase annuity of £100 for benefit of M., and if she should alien, then annuity to fall into residue: Held that the restraint on anticipation was valid, and that M. could not claim the value of the annuity in bulk.—*Hatton v. May*, L.R. 3 Ch.D. 148; 24 W.R. 754.
- (xliii.) **Ch. Div. V. C. B.**—*Annuity—Forfeiture.*—A testator bequeathed an annuity and certain gifts for life, or until he should encumber or assign: Held that on the issue of a writ of sequestration against plaintiff the forfeiture clause came into operation and determined interest of plaintiff, who was ordered to pay costs of special case stated in a suit instituted by him against the trustees.—*Dixon v. Rowe*, 25 L.T. 549.
- (xliv.) **Ch. Div. V. C. M.**—*Annuity—Remoteness.*—Testator gave to A. an annuity for her life, and after her death to her children equally during their lives, and after decease of the survivor of them to go to his own nephew and nieces equally; A. died without issue: Held that the nephew and nieces took the capital producing the annuity absolutely as tenants in common.—*Evans v. Walker*, L.R. 3 Ch.D. 211; 25 W.R. 7.
- (xlv.) **Ch. Div. V. C. H.**—*Charitable Bequest—Mortmain Act (9 Geo. II., c. 36) s. 8.*—Debentures issued by Aberystwith Improvement Commissioners on works, rents, and rates under private Act authorising acquisition of land for construction of waterworks: Held an interest within Mortmain Act.—*Chandler v. Howell*, L.J. 46 Ch. 25; 35 L.T. 592; 25 W.R.
- (xlv.) **Ch. Div. V. C. M.**—*Charitable Bequest—9 Geo. II., c. 36.*—A bequest to charities of debentures of a water-works company in the form provided by Companies Clauses Act, 1845, Sched. C. is not void under the Statute of Mortmain.—*Holdsworth v. Davenport*, L.J. 46 Ch. 20; 35 L.T. 319; 25 W.R. 20.
- (xlvii.) **C. A.**—*Construction—Charitable Bequest.*—Testator directed that his residue should be given by his executors to such charitable institutions as he should by any future codicil give the same, and, in default of any such gift, then to be distributed by his executors at their discretion; he made no subsequent codicil: Held that a trust in favour of charitable institutions to be selected by the executors was created.—*Pocock v. Attorney-General*, L.R. 3 Ch. D. 342; 35 L.T. 575.
- (xlviii.) **Ch. Div. M. R.**—*Construction—Charge of Debts and Legacies—Mortgage—Legal Estate.*—A mortgagee trustee devised and bequeathed residuary estate to his wife, and her heirs, executors, and administrators upon trust to sell, and out of proceeds to pay debts and legacies, and apply residue as directed: there was no devise of trust or mortgaged estates: Held that the legal estate in the mortgaged property did not pass.—*Re Smith's Estate*, L.R. 4 Ch. D. 70.
- (xlix.) **Q. B. Div.**—*Construction—Contingent Remainder.*—Where an estate in remainder is limited in contingency on the happening of certain events on

which (the preceding estates having determined) it will fall into possession, it is not a contingent, but a vested remainder dependent on those events.—*Leadbeater v. Cross*, L.R. 2 Q.B.D. 18; L.J. 46 Q.B. 31; 25 W.R. 96.

- (i.) **C. A.**—*Construction—Contingent Remainder.*—Devise to use of A. and B., their executors, administrators, and assigns for 120 years, if S. C., wife of J. C., should so long live, and subject thereto to the use of J. C. for life, with remainder to use of all the children of J. C. and S. C. who should be living at the death of the survivor in fee as tenants in common; J. C. died in the life-time of S. C.: *Held* that the contingent remainder to the children failed for want of an estate of freehold to support them.—*Cunliffe v. Brannkner*, L.R. 3 Ch.D. 393; 35 L.T. 578.
- (ii.) **C. A.**—*Construction—Counsel's opinion—Mistake in law.*—An executor took counsel's advice as to construction of a will: a dissatisfied legatee also took opinion of counsel, which agreed with the former: the executor having distributed the property accordingly, the legatee, two years afterwards, claimed repayment on the ground that the will was wrongly construed: *Held* that the suit could not be maintained.—*Rogers v. Ingham*, L.R. 3 Ch.D. 351; 35 L.T. 677.
- (iii.) **Ch. Div. V. C. M.**—*Construction—"Die without issue."*—Bequest to A. for life, with remainder to her children living at her decease, and if she should "die without issue," as she should appoint: A. had one child, who died in her life-time, leaving 5 children: *Held* that an appointment of the fund by A. among the grand-children was good.—*Re Mercer's Trusts*, 35 L.T. 701.
- (iv.) **C. J. B.**—*Construction—Falsa Demonstratio.*—Testator bequeathed £2,600 part of debt owing to him by K. & J. to his daughter, wife of B., and £1000 remainder of said debt to his wife for life with remainder over, and all debts owing to him by B. to B. absolutely, and directed his trustees to release B. therefrom; at date of will B. owed to testator separately £50, also £2600 upon joint and several promissory notes of self and partner, K. & J. only owed £1000. B. and partner continued to pay interest on the £2600 till they went into liquidation. *Held* that B. and partner were effectually released by the will as against the gift to B.'s wife, and that payment of the interest did not revive the debt.—*Ex parte Close, Re Bennett and Glave*, L.J. 46 Bpex. 3.
- (v.) **Ch. Div. V. C. H.**—*Construction—"Foreign Bonds."*—Bequest of "the foreign bonds amounting to about £8,000" purchased by testatrix, *Held* not to pass Colonial bonds forming part of the amount.—*Hull v. Hill*, L.R. 4 Ch.D. 97; 25 W.R. 223.
- (vi.) **Ch. Div. M. R.**—*Construction—Gift to Class.*—Devise to children of A. who should be living at testator's decease, or have died in his lifetime leaving issue living at his death as tenants in common. *Held* that surviving children took the whole to exclusion of issue of child who died in testator's lifetime, and also of the heir at law.—*Coleman v. Jarcom*, L.J. 46 Ch. 38; 35 L.T. 614; 25 W.R. 137.
- (vii.) **Ch. Div. M. R.**—*Construction—Gift to Class—Mistake—Evidence.*—Where a testator in a bequest to a class describes the class as consisting of a number differing from the number existing at the date of the will, the presumption that he intended to benefit the whole class is liable to be rebutted by evidence.—*Newman v. Piercey*, L.R. 4 Ch. D. 41; L.J. 46 Ch. 36; 35 L.T. 461; 25 W.R. 37.
- (viii.) **Ch. Div. M. R.**—*Construction—Gift to Executors.*—Testatrix gave £100 to "executors or executrix" of C., who left two executors and an executrix, who all predeceased testatrix: *Held* a gift to C.'s personal representatives as part of his estate: a share in the residue having lapsed. *Held* that costs of an administration suit were payable out of the general residue, not primarily out of the lapsed share.—*Trehevy v. Helyar*, L.H. 4 Ch. D. 53.

- (lviii.) **Ch. Div. V. C. H.**—*Construction—Illegitimate children.*—Where the H.L. had decided on the construction of a will, that two illegitimate children of testator's daughter born at the date of the will were sufficiently designated and took under the will: *Held* that a child then *en ventre sa mere* also took, but not a child begotten and born after testator's death.—*Crook v. Hill*, L.R. 3 Ch. D. 773; 24 W.R. 876.
- (lix.) **Ch. Div. V. C. M.**—*Construction—"Legal or next of kin."*—Testator bequeathed personalty to his children, the share of his daughters to be "vested in the Bank in their own name, and the interest for life to be received by them,"... "but to descend to their legal or next of kin." *Held* that daughters took life interest, and that subject thereto the next of kin, without regard to the Statutes of Distribution, were entitled.—*Harris v. Newton*, 25 W.R. 228.
- (lx.) **Ch. Div. V. C. B.**—*Construction—Liability for Calls.*—Testator authorised his trustees to invest in shares of any company in Great Britain, and he also declared that "the calls, if any, which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate," should be paid out of income: *Held* that instalments due on certain railway shares and calls payable in respect of other shares belonging to the testator at his death, were payable out of income, but not calls in respect of shares allotted to and accepted by the trustees after his death.—*Bevan v. Waterhouse*, L.R. 3 Ch. D. 752.
- (lxi.) **Ch. Div. V. C. M.**—*Construction—Life interest.*—Testator bequeathed residue in trust for his children, and directed that the trustees should pay the income of each daughter's share to her for life, with remainder in trust for her children: *Held* that the children of a daughter who pre-deceased testator were entitled to their mother's share.—*Unsworth v. Speakman*, 35 L.T. 731; 25 W.R. 225.
- (lxii.) **Ch. Div. V. C. M.**—*Construction—Maintenance.*—Testator directed his trustees to raise yearly sums for the maintenance of his sons during infancy, and of his daughters during infancy, or till marriage; and gave to each of his children legacies on attaining majority, or on marriage, respectively: *Held* that the legacies did not carry interest until the legatees attained majority, or married, respectively.—*Re George's Estate*, 25 W.R. 182.
- (lxiii.) **Ch. Div. V. C. H.**—*Construction—"Other daughters surviving."*—Gift in trust for such of testator's daughters as should be living at his death, income of each daughter's share to be paid to her during her life, with remainder to her children, and, in default of issue, to testator's "other daughters or other daughter surviving." *Held* that the period of survivorship must be death of testator.—*Beckwith v. Beckwith*, 25 W.R. 6.
- (lxiv.) **Ch. Div. M. R.**—*Construction—Power.*—Bequest to A. for life and after her death to and amongst testator's other children or their issue "in such parts, shares, and proportions, manner and form" as A should appoint: *Held* that the power of appointment was exclusive.—*Re Veale's Trusts*, L.R. 4 Ch.D. 61; 35 L.T. 612; 25 W.R. 122.
- (lxv.) **Ch. Div. V. C. H.**—*Construction—Precatory Trust.*—Bequest to wife "and for my dear wife to do justice to those relations on my side such as she think worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who my dear wife may please." *Held* not to create a precatory trust.—*Re Bond*, 25 W.R. 95.
- (lxvi.) **C. A.**—*Construction—Shifting clause.*—*Held*, on the construction of a shifting clause (reversing decision of M.R.), that a younger son could not become the "eldest son" after his father's death, and that consequently the shifting clause never took effect.—*Harvey Bathurst v. Stanley*, 35 L.T. 709.

- (lxvii.) **Ch. Div. M. R.—Heirlooms.**—The Court has no jurisdiction when the testator's debts have been paid to order the sale of heirlooms settled in strict settlement.—*D'Eyncourt v. Gregory*, L.R. 3 Ch.D. 635 ; 45 Ch. 741 ; 25 W.R. 6.
- (lxviii.) **Ch. Div. V. C. H.—Leaseholds**—17 & 18 Vict. c. 113.—Locke King's Act does not apply to leaseholds.—*In re Wormaley*, 25 W.R. 141.
- (lxix.) **Ch. Div. V. C. H.—Maintenance—Trustee Act.**—Money payable under a will to two infants at 21, with trusts for maintenance, &c., was invested in stock in joint names of the executors and infants ; the executors died : *Held* that the infants were trustees of their respective shares within the Trustee Acts, 1850 and 1852.—*Gardner v. Cowles*, L.R. 3 Ch. 804 ; 24 W.R. 843.
- (lxx.) **Ch. Div. V. C. M.—Married Woman—Separate Property.**—By marriage settlement personalty was settled in default of issue upon trust if the wife should survive her husband for her separate use absolutely, but if she should not survive her husband, for such of her relations as she should by will appoint : she made a will in exercise of the power during coverture, and survived her husband without issue : *Held* that the will effectually disposed of the property.—*Bishop v. Wall*, L.R. 3 Ch.D. 194 ; L.J. 45 Ch. 773 ; 25 W.R. 93.
- (lxxi.) **Ch. Div. V. C. B.—Power of Appointment—Residuary Gift.**—A fund was settled on children of A. as he should appoint, and in default of appointment equally ; A. appointed the fund to trustees, as to £1200 to his child B. for life, and after his death to his children, and in default of children, then that the £1200 should "form part of the residue of the trust estate" : the trusts of the residue were for daughters of A. for life, with powers of testamentary appointment : *Held* that the gift to the children of B. being admittedly excessive, the £1200 was after death of B. effectually appointed by the residuary gift.—*Re Meredith's Trusts*, L.R. 3 Ch.D. 757 ; 25 W.R. 107.

Quarterly Digest

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FOR FEBRUARY, MARCH, AND APRIL,* 1877.

By L. G. GORDON ROBBINS, Barrister-at-Law.

Administration:—

- (xiv.) **C. A.**—*Old Suit—Fund in Court—Distribution.*—Where money had been paid into Court in an old administration suit: *Held* (affirming decision of V. C. M.) that two creditors who alone came forward in answer to advertisements were entitled to a rateable proportion out of the fund.—*Ashley v. Ashley*, 36 L.T. 200; 25 W.R. 356.
- (xv.) **C. A.**—*Partnership—Overdrawing—Proof by Trustees in Bankruptcy against Separate Estate.*—Decision of M. R., see Administration (vi.), p. 1, affirmed.—*Lacey v. Hill*, L.R. 4 Ch. D. 537.
- (xvi.) **P. D. A. Div.**—*Special Circumstances.*—Intestate was clerk to a borough treasurer who had embezzled moneys of the corporation, and it was suggested that money was also due from deceased to the corporation: *Held* that there were no “special circumstances” within 20 & 21 Vict., c. 77, s. 73, to justify the Court in refusing administration to the widow.—*Wells v. Brook*, 25 W.R. 463.

Agreements and Contracts:—

- (xix.) **C. A.**—*Fraud.*—Blenkarn was convicted of obtaining goods under false pretences from plaintiffs by means of orders signed so as to look like “Blenkiron & Co.,” a well-known and long-established firm: the defendants had *bonâ fide* purchased the goods from Blenkarn, and resold them: *Held* (reversing decision of Q. B. Div.) that the property in the goods never passed from plaintiffs, and that they were entitled to recover.—*Lindsay v. Cundy*, L.R. 2 Q.B.D. 96; 46 L.J. Q.B. 233; 25 W.R. 417.
- (xx.) **C. A.**—*Mercantile Contract.*—Contract for sale of goods to be shipped in “March ^{and} or April”: the goods were shipped in February: *Held*

* Cases reported only in the *Law Times Reports* and *Weekly Reporter* for Saturday, 28th April, are unavoidably postponed till the August Digest.

reversing decision of Q.B. Div.) that defendants were not entitled to refuse to accept the goods.—*Shand v. Bowes*, L.R. 2 Q.B.D. 112; 46 L.J. Q.B. 201; 36 L.T. 161; 25 W.R. 291.

- (xxi.) **C. A.**—*Mercantile Contract*.—Contract for sale of goods to be shipped "by steamer or steamers" in February: two shipments were made, of which the first only was within the fixed time: *Held* that the contract was divisible, and that consignee was bound to accept the first shipment.—*Brandt v. Lawrence*, L.R. 1 Q.B.D. 344; 46 L.J. Q.B. 237; 24 W.R. 749.
- (xxii.) **C. A.**—*Sale of Specific Goods—Nonperformance—Act of God*.—Defendant contracted to sell to plaintiff 200 tons of potatoes from a land belonging to defendant at W.: owing to a blight this land only yielded 80 tons, which defendant delivered: *Held* that the contract was for sale of a specific crop, and that defendant, having been prevented by an act of God, was excused from performance.—*Howell v. Coupland*, L.R. 1 Q.B.D. 258; 46 L.J. Q.B. 147; 33 L.T. 832; 24 W.R. 470.
- (xxiii.) **Q. B. Div.**—*Statute of Frauds—Minutes of Company*.—The entry of terms of an agreement on minutes signed by the chairman is a sufficient memorandum to satisfy s. 4 of Statute of Frauds.—*Jones v. Victoria Graving Dock Co.*, 46 L.J. Q.B. 219; 36 L.T. 144; 25 W.R. 348.
- (xxiv.) **C. P. Div.**—*Wager—8 & 9 Vict., c. 109, s. 18*.—Plaintiff, a "tipster," gave to defendant the name of a horse as the probable winner of a race, on the agreement that if the horse should win, the plaintiff was to receive £50 out of defendant's winnings, but if the horse lost, the plaintiff should pay to defendant £2: the horse having won: *Held* that plaintiff could not recover.—*Higginson v. Simpson*, L.R. 2 C.P.D. 76; 46 L.J. C.P. 192; 36 L.T. 17; 25 W.R. 303.
- (xxv.) **Ex. Div.**—*Warranty*.—A contract for the sale and purchase of a locomotive engine was embodied in a series of letters, in one of which vendor made certain representations as to the material of the boiler tubes: the engine was subsequently inspected by plaintiff's engineer, who found the tubes to be of inferior metal: *Held*, on construction of the letters and the facts of the case, that defendant had given an express warranty, which was not affected by the inspection.—*Cowdy v. Thomas*, 36 L.T. 22.

Banker:—

- (vi.) **C. A.**—*Cheque—Indorsement as Agent within 16 & 17 Vict., c. 59 s. 19*.—Judgment of C.P. Div., see Banker (ii.), p. 3, affirmed.—*Charles v. Blackwell*, 36 L.T. 195; 25 W.R. 472.
- (vii.) **Q. B. Div.**—*Scrip—Custom*.—Scrip certificates of banking companies partly paid-up, but not containing the name of the person to be registered as shareholder, are negotiable instruments by the custom of the monetary world, and pass by delivery.—*Rumball v. Metropolitan Bank*, 36 L.T. 240; 25 W.R. 366.

Bankruptcy:—

- (lxv.) **C. A.**—*Act of Bankruptcy—Bill of Sale—Composition of Felony*.—Decision of C. J. B., see Bankruptcy (i.), p. 4, over-ruled.—*Ex parte Caldecott, Re Mapleback*, L.R. 4 Ch. D. 150.
- (lxvi.) **C. J. B.**—*Act of Bankruptcy—Bill of Sale—Fraudulent preference—Contempt*.—A. and his wife, after act of bankruptcy by A., gave a bill of sale on their whole property to secure a debt of Mrs. A.'s former husband, whose executrix she was, and whose business she carried on herself till her second marriage, and thereafter in conjunction with A.; grantee of bill of sale and trustee in bankruptcy entered into concurrent possession; before the question of validity of bill of sale was decided, grantee forcibly removed part of property: *Held* that the bill of sale was void, that the removal was unlawful, and that the property must be restored to the

- trustee in bankruptcy, and costs of motion to compel restoration paid by the grantee.—*In re Fells, Ex parte Andrews*, L.R. 4 Ch. D. 509; 46 L.J. Bpoy. 23; 36 L.T. 38; 25 W.R. 382.
- (lxxvii.) **C. B.**—*Act of Bankruptcy—Bill of Sale—Registration.*—Debtor gave bill of sale on all his property to secure past debt and further advances, stipulating that such bill should not be registered, but that he would, if called on, give a fresh bill which might be registered: the debtor having subsequently filed liquidation petition: *Held* that the agreement was valid, and that the giving of a fresh bill of sale in pursuance thereof was not an act of bankruptcy.—*In re Jackson, Ex parte Hall*, L.R. 4 Ch. D. 682; 46 L.J. Bpoy. 39; 35 L.T. 947; 25 W.R. 382.
- (lxxviii.) **C. A.**—*Adjudication.*—The hearing of a petition for adjudication was adjourned after proof of act of bankruptcy, to enable debtor to make arrangements for payment of his creditors: at the adjourned hearing debtor tendered to petitioning creditor the amount of such creditor's claim and costs which was refused: *Held* that the Registrar rightly made order for adjudication.—*Ex parte Brigstocke, In re Brigstocke*, L.R. 2 Ch. D. 348; 35 L.T. 881; 25 W.R. 262.
- (lxxix.) **C. A.**—*Bill of Exchange—Notice of Dishonour.*—On bankruptcy of drawer of a bill of exchange which was dishonoured, holders knowing of the bankruptcy but not of the appointment of a trustee, gave notice to the bankrupt at a former address which was alone known to them: *Held* that the notice was sufficient.—*In re Bellman, Ex parte Baker*, 25 W.R. 454.
- (lxxx.) **C. A.**—*Composition—Action by Creditor—Injunction.*—The Court will not restrain an action by creditor against compounding debtor unless vexatious or unfounded.—*Re Lopes, Ex parte Lopes*, 36 L.T. 275; 25 W.R. 419.
- (lxxxi.) **C. P. Div.**—*Composition—Debtor's Statement.*—Where a creditor is an assenting party to a composition the debtor is released from all debts owing to such creditor, though not included in debtor's statement.—*Wilson & Brown v. Breslauer*, 36 L.T. 18.
- (lxxxii.) **C. P. Div.**—*Composition—Debtor's Statement.*—F. drew bills accepted by W. for £8,000, indorsed to the N. Bank, the bills being secured by mortgage of a ship: W. having filed petition for liquidation or composition by his statement stated F. to be a secured creditor for the £8,000: subsequently the bills were transferred to F.: *Held* that the composition was a good defence to action on the bills.—*Forwood v. Walker*, 36 L.T. 21.
- (lxxxiii.) **C. J. B.**—*Composition—Resolution—Registration—Proxy.*—A resolution for composition having been put to the vote and lost, debtor's solicitor produced a creditor's proof and his proxy signed in blank, it was received under protest, and the resolution was declared carried, and was subsequently confirmed and registered without notice to objecting creditor: *Held* that the proxy was void, and the registration could not stand.—*Ex parte Bailey, Re Lancaster*, 36 L.T. 72; 25 W.R. 381.
- (lxxxiv.) **C. P. Div.**—*Composition—Debtor's Statement.*—Pending an arbitration defendant filed petition for liquidation, and a composition being agreed to, he included in his statement the plaintiffs as creditors for the full amount claimed, with a note appended that the claim was disputed: *Held* that the claim was sufficiently inserted in the statement.—*Melhado v. Watson*, 36 L.T. 18.
- (lxxxv.) **C. A.**—*Composition—Guarantee of Instalments—Subsequent Bankruptcy—Release of Surety.*—Decision of Q. B. Div., see Bankruptcy (li.), p. 48, affirmed.—*Glegg v. Gilbey*, L.R. 2 Q.B.D. 209; 35 L.T. 927; 25 W.R. 311.

- (lxxxvi.) **C. J. B.**—*Composition—Resolution—Registration.*—Debtor's statement showed assets £50, liabilities £1,366: *Held* that a resolution to accept 6d. in the pound was reasonable, and must be registered.—*In re Williams, Ex parte Williams*, 25 W.R. 432.
- (lxxxvii.) **C. J. B.**—*Composition—Solicitor's Lien.*—Creditors of C. accepted composition payable by instalments; no trustee was appointed: C.'s solicitor paid first instalment out of debtor's money, and having received from debtor and his sureties further monies, sufficient for payment of second instalment, paid some of the creditors, but C. having absconded, retained the remainder, claiming to have a lien thereon for costs due from C.: *Held* that the solicitor had constituted himself trustee for creditors, and must apply the remainder of the money in paying the second instalment.—*In re Clarke, Ex parte Newland*, L.R. 4 Ch. D. 515; 35 L.T. 916; 25 W.R. 275.
- (lxxxviii.) **C. J. B.**—*Equitable Mortgage—Fixtures—Bills of Sale Act.*—An equitable mortgage of leaseholds by deposit of deeds will not pass trade fixtures as against trustee in bankruptcy without registered assignment under Bills of Sale Act.—*Ex parte Tweedie, Re Trethowan*, 36 L.T. 70; 25 W.R. 399.
- (lxxxix.) **C. A.**—*Execution Creditor.*—Possession money may be taken into account in ascertaining whether execution against a trader is for a sum exceeding £50.—*In re Grubb, Ex parte Sims*, 25 W.R. 453, affirming decision of C. J. B., reported L.R. 4 Ch. D. 521; 36 L.T. 40; 25 W.R. 276.
- (xc.) **C. J. B.**—*Liquidation—Discharge.*—Undischarged debtors re-commenced business, and afterwards filed a second liquidation petition: creditors under both liquidations resolved that he should be entitled to discharge on payment of £475 as purchase-money for his estate: this whole amount was, under Order of Court, paid over to the trustee under first liquidation: *Held* that debtor was entitled to discharge without further payment to trustee under second liquidation.—*In re Caughey, Ex parte Caughey*, L.R. 4, Ch. D. 533; 46 L.J. Bpcy. 18; 36 L.T. 39; 25 W.R. 308.
- (xci.) **C. P. Div.**—*Liquidation—Discharge—Barred Debt.*—*Held* that a certificate of discharge was a good answer to the claim of a creditor, without notice of liquidation, and whose name was omitted from debtor's statement, in respect of a debt incurred before the discharge: a promise to pay a debt barred by discharge cannot be enforced.—*Heather & Son v. Webb*, 46 L.J. C.P. 89; 25 W.R. 253.
- (xcii.) **C. J. B.**—*Liquidation—First Meeting—Resolutions.*—Where registrar summoned creditors to meet at a place other than that mentioned in debtor's affidavit: *Held* that the resolutions were invalid, but gave leave to debtor to summon a fresh first meeting.—*Re Mayer, Ex parte Lewis*, L.R. 4 Ch. D. 519; 46 L.J. Bpcy. 33; 35 L.T. 915; 25 W.R. 275.
- (xciii.) **C. J. B.**—*Liquidation—Receiver.*—Where creditors wish to appoint a receiver of their own, in place of a receiver appointed by the Court, they must show good reason for the application, and indemnify the outgoing receiver against all costs, expenses, and liabilities incurred by him.—*Ex parte Rylands, Re Chester*, 36 L.T. 264.
- (xciv.) **C. J. B.**—*Liquidation—Resolutions.*—Creditors at a general meeting resolved that a liquidation be agreed to, that a trustee be appointed, and that such trustee sell debtor's estate so as to pay to creditors a composition: *Held* that the resolutions, except that for the sale of debtor's estate, were good, and that an injunction must be granted to restrain a creditor, not a party to the proceedings, from enforcing an execution against debtor.—*In re Dugdale, Ex parte Dugdale*, 25 W.R. 468.

- (xov.) **C. J. B.**—*Liquidation—Undischarged Debtor—Earnings.*—Liquidating debtor, a painter, before discharge contracted to paint a yacht for £49, representing £15 for debtor's labour, £15 for wages of workman, £10 for materials, and £9 for profit: he got the materials on credit, and borrowed money to pay wages: *Held* that the trustee was entitled to the whole amount.—*In re Dowling, Ex parte Banks*, L.R. 4 Ch. D. 689; 36 L.T. 117.
- (xcvi.) **C. A.**—*Proof—Annuity.*—An annuity during life or widowhood is not a debt "incapable of being fairly estimated" under Bankruptcy Act, 1869, s. 31.—*Re Blakemore, Ex parte Blakemore*, 25 W.R. 488.
- (xcvii.) **C. A.**—*Proof—Mortgage—Interest Varying with Profits.*—By a mortgage of leaseholds to secure a loan to a trader, it was provided that mortgagees should receive a share of the profits in lieu of interest: *Held* that 28 & 29 Vict., c. 86, s. 5, precluded mortgagees from recovering his debt in competition with the other creditors, but did not affect the security.—*In re Lonergan, Ex parte Shail*, 36 L.T. 270; 25 W.R. 420.
- (xcviii.) **C. A.**—*Proof—Partnership.*—Decision of C. J. B., see Bankruptcy (lxv.), p. 50, affirmed.—*Ex parte Armitage, Re Good*, 25 W.R. 422.
- (xcix.) **C. J. B.**—*Reputed Ownership—Debenture of Company—Trade Debts.*—A debenture of a company is a chose in action within Bankruptcy Act, 1869, s. 15, sub-sec. 5, and an assignment thereof by indorsement in blank is good against trustee of bankrupt assignor, although assignee does not give notice to company before the bankruptcy: the words "debts due to the bankrupt in the course of his trade," include only debts connected with such trade.—*In re Pryce, Ex parte Rensbury*, L.R. 4 Ch. D. 685; 36 L.T. 117; 25 W.R. 432.
- (c.) **C. A.**—*Secured Creditor—Receiver—Priority—Notice.*—Decision of C. J. B., see Bankruptcy (lxvi.), p. 50, affirmed.—*Re Lever, Ex parte Garrard*, 36 L.T. 42; 25 W.R. 364.
- (ci.) **C. J. B.**—*Stoppage in Transitu.*—Goods directed to W. were on arrival at F. warehoused by C. & Co., as agents for the shipping company: C. & Co. used to inform the consignees of the arrival of the goods, and to forward them, as instructed, by and at expense of consignees: *Held* that consignees were entitled to stop the goods *in transitu* until the consignees' instructions were received by C. & Co.—*Re Worsdell, Ex parte Barrow*, 25 W.R. 466.
- (cii.) **C. A.**—*Stoppage in Transitu—Vendor's Lien—Bills of Sale Act.*—W. agreed to supply goods to L. for shipment to Shanghai, the vendor to have a lien on bills of lading and goods: before the goods arrived at Shanghai, L. became bankrupt: *Held*, upon the construction of the agreement and the facts of the case, that W. was entitled to stop the goods *in transitu* until their arrival at Shanghai: also that the agreement did not require registration under the Bills of Sale Act.—*Ex parte Watson, Re Love*, 36 L.T. 75; 25 W.R. 489.
- (ciii.) **Q. B. Div.**—*Stoppage in Transitu—Delivery of Bills of Lading—Vendor's Lien.*—Plaintiff *bonâ fide* received from G., as additional security for an advance previously made, bills of lading of a cargo consigned to G. by defendant, against bills of exchange accepted by G.: *Held* that defendant, on the insolvency of G., was entitled to stop the cargo *in transitu*, as plaintiff had not made the advance on faith of delivery of the bills of lading.—*Leask v. Scott*, 35 L.T. 908.
- (civ.) **C. A.**—*Trustee—Fresh Action—Estoppel.*—Decision of Ex. Div., see Bankruptcy (lxvii.), p. 50, affirmed.—*Bennett v. Gamgee*, 46 L.J. Ex. 204; 36 L.T. 48; 25 W.R. 310.

Bill of Sale:—

- (vii.) **C. J. B.**—*Fixtures—Registration—17 & 18 Vict., c. 36.*—Debtor

assigned by way of mortgage leasehold land, together with engines, machinery, plant, &c., placed or used thereon, to hold the land and such of the machinery, &c., as were landlord's fixtures for the residue of the term, and such as were tenants' or trade fixtures to the mortgagee absolutely, and the deed gave power to the mortgagee to sell the premises, or any part thereof, either together or in parcels: *Held* that the deed empowered mortgagee to sever the trade fixtures and sell them separately, and required registration under the Bills of Sale Act.—*In re Eslick, Ex parte Alexander*, L.R. 4 Ch. D. 503; 46 L.J. Bpoy. 30; 35 L.T. 914; 25 W.R. 260.

- (viii.) C. A.—*Growing Crops*.—*Held*, affirming decision of C.P. Div., that growing crops, not being capable of immediate transfer by delivery, are not within the Bills of Sale Act.—*Brantom v. Griffiths*, 36 L.T. 4; 25 W.R. 313.

Canada, Law of:—

- (v.) P. C.—*Appeal*.—*Order of Superior Court*.—*Held* that an appeal lay to the Court of Queen's Bench from an order of Superior Court for the removal of Commissioners in expropriation.—*Mayor, &c., of Montreal v. Brown*, L.R. 2 App. 168.

Charity:—

- (i.) Ch. Div. M. R.—*Action for Recovery of Land*.—The sanction of the Charity Commissioners is not necessary, under 17 & 18 Vict., c. 137, ss. 17-18, to enable governors of a charity to bring an action for recovery of possession of lands of the charity.—*Holme v. Guy*, 46 L.J. Ch. 223; 25 W.R. 390.

Common:—

- (i.) App. Div. Ct.—*Inclosure Act—Rate—Distress*.—By an Inclosure Act, Commissioners were empowered to perform certain works, and were required to direct by their award "by whom and at whose expense, at what time and in what manner" the works were to be made and maintained: the award directed that the works should be maintained by a rate enforceable by distress: *Held* that an action would not lie to recover the amount of the rate.—*Darby v. Watson*, 25 W.R. 465.

Company:—

- (xxiii.) Ch. Div. V. C. B.—*Directors—Borrowing Powers*.—Where directors having borrowing powers issued debentures at a discount: *Held* that the issue was not illegal, and that a director taking such debentures was not liable for difference between issue price and par. *Re Compagnie Generale de Bellegarde. Campbell's Case*. L.R. 4 Ch. D. 470; 35 L.T. 900; 25 W.R. 299.
- (xxxiii.) C. A.—*Director—Qualification—Fraudulent Agreement—Misfeasance*.—Articles of Association, alterable only by general meeting of company, or special resolution, contained no provision as to directors' qualification: the board resolved that qualification should be 250 shares: an agreement was afterwards entered into between the company and a promoter for, amongst other things, allotment of certain shares to himself or his nominees, and for the acceptance of his nominees as directors: R., nominated by the promoter, was elected director, being informed that qualification was 200 shares, which were allotted to him out of promoter's shares: he approved of a second agreement in effect ratifying the former: *Held*, upon the facts of the case, that R. was not bound by the resolution of the board, nor liable to contribute in respect of 250 shares, but that he was guilty of misfeasance in being a party to the agreement, and was liable, under Companies Act, 1862, s. 165, to pay the liquidator the full nominal value of 200 shares.—*Re British Provident Life, &c., Asson., De Ruviné's Case*, 25 W.R. 476.

- (xxxiv.) **Ch. Div. V. C. M. & C. A.**—*Director—Trustee*.—L., who had been a director of a company, bought at a reduced price debentures of the company which had been improperly issued during his directorship: *Held* by V. C. M. that L. was a trustee for the company, and was not entitled to make a profit by the transaction: on appeal the suit was compromised but the Court expressed approval of V. C. M.'s decision.—*Re Imperial Land Co. of Marseilles, Ex parte Lurking*, L.R. 4 Ch. D. 566; 46 L.J. Ch. 235.
- (xxxv.) **C. A.**—*Misrepresentation—Prospectus—Sale by Promoters to Company—Qualification and Nomination by Vendors of Directors*.—Decision of V. C. M., see Company (xxi.), p. 52, reversed.—*New Sombrero Co. v. Erlanger*, 36 L.T. 222; 25 W.R. 436.
- (xxxvi.) **Ch. Div. V. C. M.**—*Novation*.—The St. N. Co. being indebted to the E. Bank, was amalgamated with the Société de Commerce, which undertook the liabilities of the company: the Société having gone into liquidation, proceedings were taken in France by the bank to recover the amount due from the company at the date of the amalgamation, when it was decided that the Société was not liable: *Held* that the company, having omitted to effectually substitute the Société as debtor to the bank, remained liable for the debt.—*Re the St. Nasaire Co.*, 25 W.R. 424.
- (xxxvii.) **Ch. Div. M. R.**—*Resolution—Reduction of Capital*.—A company having capital divided into shares of £32 each, on which (except as to 515 shares fully paid-up) £29 had been paid, passed a resolution in conformity with their Articles for reduction of the capital by extinction of £9 per share, retaining liability of £3 on each share not fully paid-up: *Held* that the Court had no jurisdiction to confirm the resolution.—*Re Ebbw Vale Steel, &c., Co.*, 46 L.J. Ch. 24.
- (xxxviii.) **C. A.**—*Vendor's Guarantee of Profits—Discontinuance of Works—Effect on Guarantee*.—Decision of V. C. B., see Company (viii.), p. 9, reversed.—*Brown & Co. v. Brown*, 36 L.T. 272.
- (xxxix.) **Ch. Div. V. C. B.**—*Winding-up—Director's Qualification*.—Articles of association provided that director's qualification should be the actual holding of twenty-five share warrants each representing one fully paid-up share: on appointment of the directors a promoter deposited with company's bankers twenty-five share warrants to the amount of each director as his qualification: *Held* that each director was liable under Companies Act, 1862, s. 165, for full nominal value of twenty-five shares.—*Re Caerphilly Colliery Co., Pearson's Case*, L.R. 4 Ch. D. 222.
- (xl.) **Ch. Div. M. R.**—*Winding-up—Disputed Claim—Injunction*.—The Court has jurisdiction to restrain by injunction the creditor of a solvent company whose claim is disputed from presenting a petition to wind-up the company.—*Niger Merchants Co. v. Capper*, 25 W.R. 365.
- (xli.) **Ch. Div. V. C. B.**—*Winding-up—Guarantee Fund*.—Vendor of property agreed to invest part of purchase-money as guarantee fund for payment of dividends for four years: the articles of association referring to this agreement provided that the fund should be considered as profits and applicable only to the payment of dividends: *Held* that on winding-up of the company the guarantee fund must be paid over to the liquidator.—*Re Stuart's Trusts*, L.R. 4 Ch. D. 213; 46 L.J. Ch. 86; 25 W.R. 295.
- (xlii.) **Ch. Div. V. C. M.**—*Winding-up—Liquidator*.—The same person will not be allowed to act as liquidator to two companies having conflicting interests.—*In re City and County Investment Co.*, 25 W.R. 342.
- (xliii.) **C. A.**—*Winding-up—Maritime Lien—Leave to proceed in Admiralty Division*.—Master of ship drew bill of exchange on company for expenses: the bill was accepted by the company, but dishonoured, and was paid by the master: *Held* that the master was entitled to order giving leave

to proceed in Admiralty Division, to enforce his maritime lien on the ship, against mortgagees in possession thereof, for his claim and costs properly incurred.—*Re Rio Grande do Sul Steamship Navigation Co.*, 25 W.R. 328.

- (xliv.) **Ch. Div. V. C. B.**—*Winding-up—Vendor's Guarantee.*—On sale of property to a company, vendor guaranteed a dividend for four years, and a part of the purchase-money was invested as a fund to meet such dividends by selling out and paying to the directors half-yearly a part of such fund: before the fund was exhausted the company went into liquidation: *Held* that the balance of the fund was part of the assets of the company and belonged to the liquidator.—*Re the Welsh Freehold Coal and Iron Co.*, 36 L.T. 788.

- (xlv.) **Q. B. Div.**—*Vendor's Guarantee—Releases.*—By agreement on sale of a business to a company U. the vendor guaranteed a dividend for five years, and was appointed managing director: within two years it was arranged by a resolution that U. should be released from his guarantee on his surrendering his qualification shares and giving to the company five patents connected with the business: U. surrendered his shares and a new director was appointed, but it turned out that only one of the patents was valid: the jury had found that there was no wilful misrepresentation by U.: *Held* that the resolution was not *ultra vires*, and that plaintiffs were not entitled to set aside the arrangement.—*Sheffield Nickel Plated Co. v. Unwin*, 36 L.T. 246; 25 W.R. 493.

Copyhold:—

- (iii.) **Ch. Div. V. C. H.**—*Right of Lord to Gravel.*—Lord of Manor may take gravel, loam, etc., for his own use or for sale, from waste lands, so long as he does not infringe rights of commoners; the *onus probandi* as to such infringement is on the tenant.—*Hall v. Byron*, L.R. 4 Ch. D. 667; 24 W.R. 317.
- (iv.) **Q. B. Div.**—*Turbary and Estovers—Approvement.*—Lord of Manor is not of common right and in virtue of ownership of soil entitled to approve against common of turbary and estovers, but evidence of custom may be adduced to justify such right, and it was *held*, on the facts of this case, that such custom was sufficiently proved.—*Lascelles v. Lord Onslow*, 25 W.R. 496.

Copyright:—

- (v.) **Ch. Div. M. R.**—*Periodical—Registration.*—Registration before the actual date of publication of a periodical is no protection under 5 & 6 Vict., c. 45.—*Henderson v. Maxwell*, 25 W.R. 455.

County Court:—

- (vi.) **App. Div. Ct.**—*Appeal in Equity Cases—Judge's Notes.*—Notes compiled by County Court Judge without request of the parties, and subsequently to the trial, were, being in Court, received: to give ground for appeal in equity cases there must be a misapplication of principles of equity to the facts found by the Judge.—*Hill v. Persse*, 25 W.R. 275.
- (vii.) **Q. B. Div.**—*Appeal by Motion.*—Under County Courts Act, 1875 (38 & 39 Vict., c. 50), s. 6, the right to appeal by motion applies to all actions where leave to appeal may be given, and where such leave is unnecessary.—*Turner v. Gt. Western Rail. Co.*, L.R. 2 Q.B.D. 125; 46 L.J. Q.B. 226; 35 L.T. 809.
- (viii.) **C. A.**—*Bankruptcy Jurisdiction—Injunction.*—County Court judge has power under Bcoy. Act, 1869, to restrain by injunction action for foreclosure brought in Chancery Division, even though such action be commenced before the bankruptcy proceedings.—*Snow v. Sherrwell*, 25 W.R. 433.

- (ix.) **Q. B. Div.**—*Prohibition—Jurisdiction—Letter sent by Post.*—Held that the fact that a letter was written and posted at C., requesting defendant to collect a debt elsewhere, did not give the C. County Court jurisdiction to try action for recovery of sum collected.—*Rennie v. Ratcliffe*, 35 L.T. 833; 25 W.R. 319.
 - (x.) **App. Div. Ct.**—*Remission of Action.*—When an action is remitted for trial to a County Court, the division of the High Court in which it was instituted still retains it for further direction.—*Swan v. Inglis*, 36 L.T. 114.
 - (xii.) **Q. B. Div.**—*Remission of Action.*—Motion for new trial in action remitted to County Court must be made to the County Court.—*White v. Mainwaring*, 25 W.R. 253.
 - (xii.) **Q. B. Div.**—*Remission of Action.*—Where action is remitted to County Court, judgment must be signed in Superior Court.—*Scutt v. Freeman*, L.R. 2 Q.B.D. 177; 46 L.J. Q.B. 173; 35 L.T. 939; 25 W.R. 251.
- Crimes and Offences:—**
- (xv.) **App. Div. Ct.**—*Adulteration.*—An excessive admixture of water in gin is a fraudulent increase of the article within 38 & 39 Vict., c. 63, s. 6.—*Pashler v. Stevenitt*, 35 L.T. 862.
 - (xvi.) **C. A.**—*Conspiracy.*—Decision of Q.B. Div., see Crimes and Offences (iv.), p. 11, affirmed.—*Regina v. Aspinall*, L.R. 2 Q.B. Div. 43; 46 L.J. M.C. 145; 35 L.T. 788; 25 W.R. 288.
 - (xvii.) **C. C. R.**—*Debtor's Act, s. 19—Indictment.*—Held that an indictment for fraudulently pledging property within four months of presentation of bankruptcy petition, which did not allege the adjudication thereon, was bad after verdict.—*Regina v. Oliver & Austin*, 36 L.T. 115; 25 W.R. 323.
 - (xviii.) **C. C. R.**—*False Pretences—Previous Conviction for Felony.*—In indictment for false pretences a previous conviction for felony may be charged, and on conviction on both charges the least sentence of penal servitude that can be awarded is for seven years.—*Regina v. Deane*, 46 L.J. M.C. 155; 35 L.T. 31.
 - (xix.) **C. C. R.**—*False Pretences—Sale of Spurious Goods.*—Prisoner knowingly misrepresented as good tea a mixture only one quarter in weight of tea, the remainder being articles unfit to drink and injurious to health, and by such representations induced people to purchase the mixture: Held that he was rightly convicted.—*Regina v. Foster*, 46 L.J. M.C. 128; 36 L.T. 34.
 - (xx.) **C. C. R.**—*Innkeeper—Refusal of Entertainment.*—Defendant was proprietor of an hotel, and also of a refreshment bar under the same roof, and held under the same license: prosecutor, a householder living a few hundred yards from the bar, while walking about for pleasure, applied for refreshment, but was refused because he was accompanied by dogs, whereby he caused annoyance to customers: Held that the refusal was justified because the bar was not an inn, the prosecutor was not a traveller, and there were reasonable grounds for refusal.—*Regina v. Rymer*, L.R. 2 Q.B.D. 136; 46 L.J. M.C. 108; 35 L.T. 774; 25 W.R. 415.
 - (xxi.) **C. C. R.**—*Larceny—Animals Buried in Soil.*—Where prisoners dug up diseased pigs, buried in owner's land more than three feet deep in the soil, and sold them: the Court affirmed a conviction for larceny.—*Regina v. Edwards*, 36 L.T. 30.
 - (xxii.) **C. C. R.**—*Rape—Consent—Fraud.*—A girl submitted herself to a man under the *bonâ fide* belief that he was about to perform a surgical operation upon her for the benefit of her health, whereupon he had sexual intercourse with her: Held that there was no consent such as to acquit the prisoner of a charge of rape.—*Regina v. Flattery*, 46 L.J. M.C. 130; 36 L.T. 32; 25 W.R. 393.

- (xxiii.) **C. C. R.**—*Receiving Stolen Goods—Husband and Wife.*—Wife left her husband, taking with her money and other articles belonging to him: she was afterwards found living in adultery with prisoner, who was in possession of part of the property: *Held* that as a wife cannot steal her husband's goods prisoner could not be convicted of receiving.—*Regina v. Kenny*, 46 L.J. M.C. 156; 36 L.T. 36.
- (xiv.) **Ex. Div.**—*Rogue and Vagabond—Spiritualist.*—*Held* that a person who received money for conducting spiritualistic *séances* was a rogue and vagabond within 5 Geo. IV., c. 83, s. 4.—*Monck v. Hilton*, L.R. 2 Ex. D. 268; 46 L.J. M.C. 163; 36 L.T. 66; 25 W.R. 373.
- (xv.) **Q. B. Div.**—*Vagrancy—Married Women.*—A married woman, deserted by her husband and destitute, cannot be convicted for leaving her children chargeable to the parish under the Vagrancy Act 5 Geo. IV., c. 83, s. 4.—*Peters v. Cowie*, L.R. 2, Q.B.D. 131; 36 L.T. 107.

Debtor and Creditor:—

- (ix.) **Ex. Div.**—*Statute of Limitations—Acknowledgement.*—Defendant wrote, "If you send me here the particulars of your account, with vouchers, I shall have it examined, and cheque sent for what is due; but you must be under some great mistake in supposing that the amount due is anything like the sum you now claim:" *Held*, a sufficient acknowledgement to take the case out of Statute of Limitations.—*Skeet v. Lindsay*, 46 L.J. Ex. 249; 36 L.T. 98; 25 W.R. 322.

Defamation:—

- (iv.) **C. P. D.**—*Libel.*—Plaintiffs having been advertised to sing at music halls certain songs, by permission of the publishers: *Held* that certain letters of defendant to the proprietors of the music halls expressing doubts as to the permission, and warning them as to possible liabilities under Copyright Acts, were capable of a libellous construction, and must be submitted to jury.—*Hart v. Wall*, 46 L.J. C.P. 227.
- (v.) **C. A.**—*Libel—Privilege.*—Where privilege is claimed on behalf of either a private person or the public press on the ground that the defamatory matter is a report of a trial, it is for the defendant to show that the report is a fair one, and the question of fairness is for the jury.—*Melessich v. Lloyds*, 25 W.R. 353.
- (vi.) **C. A.**—*Libel—Privilege.*—*Held* that a newspaper proprietor could not claim privilege for a report of charges made at a meeting of a board of guardians against a Poor-law medical officer.—*Purcell v. Sowler*, 25 W.R. 362.
- (vii.) **C. P. Div.**—*Libel—Question for Jury.*—Where in consequence of certain letters written to plaintiff's employers, plaintiff lost her employment: *Held* that the question whether or not such letters were libellous was for the Jury.—*Hart v. Wall*, 25 W.R. 373.

Detinue:—

- (ii.) **C. A.**—*Acquittal of Prisoner—Detention of Property—Action against Constable.*—Judgment of Ex. Div., see Detinue (i.), p. 56, affirmed.—*Bullock v. Dunlop*, 45 L.J. Ex. 151; 36 L.T. 194; 25 W.R. 293.

Easement:—

- (iv.) **Ch. Div. V. C. M.**—*Light and Air.*—B. obtained parol consent of a company to open two windows in a party wall, wherein were three other windows which B. had within twenty years opened without consent of the company: subsequently the company served B. with notice to block up all five windows, and also to raise a party wall, which would darken eight other ancient lights in B.'s tenement: these eight windows had previously been darkened to some extent by a conservatory, built over

them by B. himself: *Held* that B. was entitled to injunction to restrain the company from obstructing any of the thirteen lights.—*Bourke v. Alexandra Hotel Co.*, 25 W.R. 898.

- (v.) **C. A.**—*Right of Way—Severance of Ownership.*—A grant of a right of way to the "owner and owners for the time being" of land is severed when the land is severed, so as to give a right of way to the owner for the time being of every part of the land.—*Newcomen v. Coulson*, 25 W.R. 469.

Ecclesiastical Law :—

- (viii.) **Ar.**—*Contempt of Court.*—Where a clergyman disobeyed an order of the Court of Arches, the Dean pronounced him to be contumacious and in contempt, and directed the same to be signified to the Queen in Chancery, whereupon a writ "De contumace capiendo" was issued for the arrest and detention of such clergyman.—*Parishioners of Hatcham v. Tooth*, 36 L.T. 820.

- (ix.) **C. P. Div.**—*Exchange of Livings.*—With a view to a proposed change of livings, one of the incumbents executed a deed of resignation: the arrangement having fallen through, the patron appointed a new incumbent to the vacant living: *Held* that an action by the late rector against the new rector would not lie.—*Rumsey v. Nicholl*, 36 L.T. 252.

Estoppel :—

- (i.) **Ex. Div.**—*Deed—Recital—Receipt Clause.*—Deed recited agreement for transfer by plaintiffs to defendant of certain Letters Patent for £1,000, and witnessed that in consideration of £1,000 upon the execution, &c., paid by the defendant to plaintiffs (the receipt of which the plaintiffs thereby acknowledged and therefrom discharged the defendant), plaintiffs assigned to defendant the Letters Patent: in action for recovery of the money, which, in fact, had not been paid: *Held* that no covenant on the part of defendant to pay the money could be implied.—*Morgan's Patent Anchor Co. v. Morgan*, 36 L.T. 811.

Evidence :—

- (iv.) **Q. B. Div.**—*Bastardy Act, 1872—Corroboration.*—In an affiliation case, evidence of facts which happened before the begetting of the child is admissible in corroboration of the evidence of the mother.—*Cole v. Manning*, 46 L.J. M.C. 175; 35 L.T. 941.
- (v.) **App. Div. Ct.**—*Cheque—Stamp—Admissibility in Evidence.*—*Held* that a cheque payable to bearer, but post-dated to knowledge of person receiving and suing on it, and therefore in fact insufficiently stamped, is nevertheless admissible in evidence.—*Gatty v. Fry*, L.R. 2 Ex. D. 265; 36 L.T. 182; 25 W. R. 305.
- (vi.) **C. A.**—*Descent—Failure of Superior Line.*—Decision of Ex. Div., see Evidence (i.), p. 13, affirmed.—*Greaves v. Greenwood*, 46 L.J. Ex. 252; 36 L.T. 1.

Foreshore :—

- (i.) **Ex. Div.**—*Duchy of Cornwall.*—The Charter 11 Ed. III. granted to the Duke of Cornwall all the foreshores in that county then belonging to the Crown.—*Mayor, &c., of Penryn v. Holm*, 25 W.R. 498.

Highway :—

- (vi.) **Ex. Div.**—*Locomotive.*—*Held* that a locomotive engine the bearing-surfaces of whose wheels were not continuous was not in conformity with the Locomotive Act, 1861 (24 & 25 Vict., c. 70), s. 3.—*Stringer v. Sykes*, L.R. 2 Ex. Div. 240; 46 L.J. M.C. 139; 36 L.T. 152; 25 W.R. 273.
- (vii.) **Ex. Div.**—*Toll—Exemption—Military Officer.*—*Held* that an officer on duty and in uniform, driving in his own carriage a charger, which would

be required for duty on arrival, and carrying in the carriage articles required for purposes of her Majesty's service, was not entitled to exemption from toll, under 39 Vict., c. 8, s. 86.—*Hinds v. Thring*, 36 L.T. 217.

Husband and Wife:

- (xi.) **P. D. A. Div.**—*Dissolution Suit*—*Citation*.—Where petitioner's solicitor had absconded taking with him the citations, the Court refused to dispense with return of the citations to the registry without proof of service on respondent and co-respondent.—*Perret v. Perret & Alt*, 35 L.T. 910.
- (xii.) **P. D. A. Div.**—*Dissolution Suit*—*Counter-charge*—*Cross Suit*.—An application to strike out of answer counter-charges set up in answer to a suit for dissolution of marriage, on the ground that such charges have been disposed of in a cross suit, must be supported by an affidavit showing the charges are identical.—*Robinson v. Robinson*, 25 W.R. 376.
- (xiii.) **C. A.**—*Dissolution Suit*—*Queen's Proctor*—*Jurisdiction of C. A.*—*Costs*.—Held that the Court of Appeal has jurisdiction to order papers to be sent to the Queen's Proctor for the purpose of instructing counsel as directed by 23 & 24 Vict., c. 144, s. 5: also that on withdrawal of the appeal the Court had no power to allow the Queen's Proctor his costs.—*Le Sueur v. Le Sueur*, 36 L.T. 276; 25 W.R. 402.
- xiv.) **Ch. Div. V. C. B.**—*Dower*.—Wife married before Dower Act, joined in and acknowledged mortgage of husband's freeholds to release her dower, the reconveyance on redemption and surplus proceeds of sale being reserved to husband alone: subsequently by deed executed by husband alone, property was purported to be conveyed free of dower, subject to first mortgage, to a second mortgagee, who afterwards by deed executed only by the first mortgagee and himself, took a transfer of the first mortgage, and sold the property: the mortgagor having died: Held that the widow was entitled to dower out of the proceeds of sale, after payment of expenses and of the first mortgage debt, interest and costs.—*Dawson v. Bank of Whitehaven*, L.R. 4 Ch. D. 639.
- (xv.) **C. P. Div.**—*Separation*—*Maintenance*—Husband living apart from his wife directed her not to pledge his credit, and allowed her £12 10s. per month, which however he did not pay regularly: she incurred expenses for medical attendance: Held that husband was liable.—*Beale v. Arabin*, 36 L.T. 249.

Indian Appeals:—

- (ii.) **P. C.**—*Champerty and Maintenance*.—The English laws as to maintenance and champerty are not in force in India: an agreement to share the property in litigation is not necessarily against public policy, but is only invalid if extortionate or otherwise improper: a stranger to record cannot be rendered liable to costs on ground of interest in the suit, in the absence of malice or want of probable cause.—*Ram Coomarr Coondoo v. Chunder Canto Mookerjee*, L.R. 2 App. 186.

Infant:—

- (iii.) **Q. B. Div.**—*Custody*.—All divisions of the High Court of Justice have jurisdiction with regard to the custody of infants, and in deciding whether a father shall retain or be deprived of custody of his child, will follow the rules of equity.—*Re Goldsworthy*, L.R. 2 Q.B.D. 75; 46 L.J. Q.B. 187.
- (iv.) **Ch. Div. M. R.**—*Voidable Deed*.—Plaintiff advanced money to an infant to provide necessaries, on the security of an assignment by the infant of a reversionary interest: Held that the security could not be enforced.—*Martin v. Gale*, L.R. 4 Ch. D. 428; 46 L.J. Ch. 84; 25 W.R. 406.

Insurance:—

- (xv.) **Ch. Div. M. R.—Life Policy—Deposit.**—A. effected policy for the purpose, as he informed the company, of securing a debt to plaintiff: A. deposited the policy with plaintiff, requesting him to prepare the necessary assignment, but no such assignment was ever executed: A's debt at his death exceeded the amount of the policy: the company refused to pay the policy moneys without the assent of the legal personal representative of A.: *Held* that there had been no equitable assignment, and that the refusal was reasonable, but that the Court had power under 15 & 16 Vict., c. 86, s. 44, to dispense with presence of his representative, and ordered payment to A. of the policy moneys with interest, but deducting the company's costs.—*Crossley v. City of Glasgow Life Assurance Co.*, L.R. 4 Ch. D. 421; 46 L.J. Ch. 65; 36 L.T. 285; 25 W.R. 264.
- (xvi.) **C. A.—Marine Insurance—Freight—Valued Policy.**—Charter-party provided "Sufficient cash not exceeding £600 to be advanced against freight, if required, at ports of loading, subject to insurance and 2½ commission:" captain as owner's agent accepted disbursement account submitted by charterers for cash actually advanced, commission, and premium on policy of insurance on freight made on owner's behalf: charterers effected valued policy, on behalf of themselves and persons interested, in usual terms: this policy came to knowledge of owners after they heard of the loss: *Held* that the owners were entitled to ratify and benefit by the policy, and that the policy covered the whole freight.—*Williams v. North China Insurance Co.*, 35 L.T. 884.
- (xvii.) **H. L.—Marine Insurance—Time Policy—Warranty of Seaworthiness.**—Plaintiff effected a time policy on a ship then on his premises under repair; she was lost on the return voyage through perils of the sea brought about by her unseaworthiness: *Held* that the policy did not imply any warranty of seaworthiness, and that plaintiff was entitled to recover.—*Dudgeon v. Pembroke*, 25 W.R. 499.

Jamaica, Law of:—

- (i.) **P. C.—Practice—Service of Writ.**—Service upon resident superintendent of a company domiciled in England is good service on the company under Supreme Court Procedure Act, s. 19.—*Royal Mail Steam Packet Co. v. Braham*, 36 L.T. 220.

Jurisdiction:—

- (i.) **Q. B. Div.—Action for Rent of Premises Abroad.**—*Held* that the Court had jurisdiction to try an action for rent of premises situated in a foreign country, when both parties were domiciled in England.—*Buenos Ayres, etc., Rail. Co. v. Northern Rail. Co. of Buenos Ayres*, L.R. 2 Q.B.D. 210; 46 L.J. Q.B. 224; 36 L.T. 148; 25 W.R. 387.
- (ii.) **C. C. R.—Territorial Waters.**—A foreign ship on a voyage to a foreign port, commanded by the prisoner, a foreigner, ran into and sank a British ship within three miles of the English coast, whereby a passenger was drowned: *Held* by the majority of the Court (7 Judges to 6) that the Central Criminal Court had no jurisdiction to try the prisoner for the offence of manslaughter charged against him.—*Regina v. Keyn*, L.R. 2 Q.B.D. 90 & 2 Ex. D. 63; 46 L.J. M.C. 17.

Landlord and Tenant:—

- (xvi.) **C. P. Div.—Distress.**—Where proceeds of sale under distress are insufficient, landlord may sue for balance: no action lies against landlord under 2 W. & M. sess. 1, c. 5, s. 2, for not selling.—*Philpott v. Lehair*, 35 L.T. 855.
- (xvii.) **G. B. Div.—Lease—Agreement—Specific Performance.**—Specific performance of an agreement for a lease will not be enforced after long

lapse of time, although plaintiff has during the whole time occupied and paid rent for the premises.—*Powis v. Lord Dynevor*, 35 L.T. 940.

- (xviii.) **App. Div. Ct.**—*Lease—Construction—Uncertainty*.—By written instrument not under seal, W. purported to demise messuage to B. as tenant from year to year so long as B. kept his rent paid, and as W. had power to let the premises: the rent reserved was less than two-thirds of the annual value, and was paid quarterly: *Held* that the instrument was void as a lease for uncertainty, and because not under seal, and that B. was merely a yearly tenant.—*Wood v. Beard*, L.R. 2 Ex. D. 31; 46 L.J. Ex. 100; 35 L.T. 866.
- (xix.) **Ex. Div.**—*Lease—Statute of Frauds*.—A lease for term less than three years, with option to lessee to extend the term to period exceeding three years from date of demise, is within Statute of Frauds, and must therefore be by deed under 8 & 9 Vict., c. 106.—*Hand v. Hall*, 46 L.J. Ex. 242.
- (xx.) **C. A.**—*Mining Lease—Lessee's Covenant to pay Rent Free from Rates*.—Decision of Q.B. Div., see Landlord and Tenant (xiv.), p. 59, affirmed.—*Duke of Devonshire v. Barrow Hematite Steel Co.*, 25 W.R. 469.

Lands Clauses Act:—

- (xiii.) **C. A.**—*Compensation—Arbitration*.—Decision of C. P. Div., see Lands Clauses Act (i.), p. 18, affirmed.—*Stone v. Mayor, &c., of Yeovil*, L.R. 2, C.P.D. 99; 46 L.J. C.P. 137; 36 L.T. 279; 25 W.R. 240.
- (xiv.) **C. A.**—*Compensation—Right of Tenant*.—Where defendants had, under the powers of the Metropolitan Streets Improvement Act, 1872, purchased a house from its owner and given notice to the quarterly tenant thereof to quit on expiration of his tenancy: *Held* that the tenant had no interest under Lands Clauses Act, s. 8, so as to entitle him to compensation.—*Syers v. Metropolitan Board of Works*, 36 L.T. 277.
- (xv.) **Ch. Div., V. C. M.**—*Fund in Court—Payment out—Costs*.—Two petitions were presented by same petitioners for payment out of money paid into Court by a railway company: petitioners were entitled to part of fund under a will, whereof the trustees were parties to first petition, and to remainder under a settlement, whereof the trustees were parties to the second petition: *Held* that only one petition should have been presented, and that company should pay petitioners' costs of first petition, and only 5 guineas towards petitioners' costs of second petition, and 3 guineas towards costs of each set of trustees.—*Re Pattison's Settled Estates*, L.R. 4 Ch. D. 207.

Licensed House:—

- (iii.) **C. P. Div.**—*Permitting Drunkenness—Licensing Act, 1872*.—An inn-keeper cannot be convicted under 35 & 36 Vict., c. 94, s. 13, by reason of himself getting drunk on his own premises.—*Warden v. Tye*, L.R. 2, C.P.D. 75; 46 L.J.M.C. 111; 35 L.T. 852.
- (iv.) **App. Div. Ct.**—*Refreshment House—Sunday Trading*.—A licensed refreshment-house keeper may not sell articles for consumption off the premises on Sundays.—*Duffell v. Curtis*, 35 L.T. 853.

Lien:—

- (i.) **Ch. Div. M. R.**—*Custom of Trade—Stoppage in Transitu*.—P. Company agreed to supply rails to S. & Co. in equal instalments, to be delivered free at Liverpool, payment to be partly by cash, partly by buyer's acceptances of seller's drafts, as each instalment was ready for delivery: invoices of instalments were sent to S. & Co., together with warrants, which S. & Co. pledged with plaintiffs for value, and became insolvent: part of the rails were lying in a railway company's goods depôt in the name of agents of S. & Co.: *Held* that the form of the warrants, by the custom of the iron trade, deprived the vendors of their

lien, and that the right to stop the goods in transitu was gone.—*Merchant Banking Co. v. Phoenix Bessemer Steel Co.*, 25 W.R. 457.

Market:—

- (i.) **Q. B. Div.**—*Shop—Exmouth Market Act, 1867.*—Held that a covered skittle ground with door opening to the street, let to respondent for two days, was not his “shop” within the meaning of the Exmouth Market Act, 1867, s. 20, incorporating the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict., c. 14).—*Hooper v. Kenshole*, L.R. 2 Q.B.D. 127; 46 L.J.M.C. 160; 36 L.T. 111; 25 W.R. 368.

Master and Servant:—

- (vi.) **C. A.**—*Negligence—Common Employment—Servant Lent to Contractor.*—Decision of C. P. Div., see Master and Servant (iii.), p. 19, affirmed.—*Rourke v. White Moss Colliery Co.*, 36 L.T. 49; 25 W.R. 263.

Mines:—

- (iii.) **Ch. Div., V. C. M.**—*Coal Mine—Wrongful Working—Statute of Limitation.*—In 1863 defendant inadvertently passed boundary of adjoining mine, and took therefrom plaintiff's coal: in 1870 plaintiff first discovered what had been done: Held that there being no lack of diligence on part of plaintiff, a suit for an account of the coal worked, and for consequential damage was not barred by 21 Geo. I., c. 16.—*Ecclesiastical Commrs. v. N. E. Rail. Co.*, 36 L.T. 174.
- (iv.) **C. A.**—*Reservation—Damage to Surface—Covenant Running with the Land.*—S., owner in fee of land A. and land B., granted land A. to plaintiffs with reservation of right of mining on payment of damages in respect of any injury to buildings to be erected on plaintiffs' land: S. afterwards granted land B. with right to work mines thereunder and under land A., to defendants: Held, affirming decision of Ex. Div., that plaintiffs were entitled to compensation for injury to their buildings caused by workings under land A. and land B.—*Aspden v. Seddon*, 25 W.R. 277.

Mortgage:—

- (xi.) **Ch. Div., M. R.**—*Equitable Mortgage—Pledge.*—A. deposited with B. certain Canada Railway Bonds as security for a debt: Held that B. was a pledgee and entitled to order for sale, but not for foreclosure.—*Carter v. Wake*, L.R. 4 Ch. D. 605.
- (xii.) **Ch. Div. M. R.**—*Power of Sale.*—In 1849 a tenant for life of settled real estate mortgaged his life interest: in 1852, B., the remainderman, mortgaged his interest to the same persons: Held that the mortgagees could, in exercise of the separate powers in the two mortgages, sell and convey to a purchaser the fee simple in possession of the land.—*Re Cooper's Contract with Harlech*, 46 L.J. Ch. 133; 35 L.T. 890; 25 W.R. 301.

Municipal Law:—

- (ix.) **Ch. Div. M. R.**—*Building—Frontage Line—Penalty—Injunction.*—Where plaintiff alleged that plans of a building erected by him had been submitted to the Local Board, and that the board had made no objection till the building was completed, the Court refused to grant *ex parte* injunction to restrain Local Board from taking proceedings to recover penalty for advancing building beyond frontage line.—*Kerr v. Mayor, &c., of Preston*, 25 W.R. 265.
- (x.) **Ch. Div. M. R.**—*Compulsory Powers—Prolongation—Special Act.*—By a Special Act, compulsory powers limited to seven years were given to a Local Board for the purchase of land to construct waterworks and establish markets: shortly before the expiration of the time limited, the ratepayers authorised the board to take plaintiff's land for a market:

subsequently, the time having been prolonged by a second Act, providing only for constructing waterworks and gasworks, not for markets, the board gave plaintiff notice to treat, and ultimately notice of intention to summon jury to assess compensation: motion for injunction to restrain the board from proceeding refused with costs.—*Bentley v. Rotherham Local Board*, L.R. 4 Ch. 588.

- (xi.) **Ch. Div. V. C. M.**—*Nuisance—Injunction—Notice of Action.*—Where in an action against a Local Board for an alleged nuisance, asking for damages and also for an injunction, plaintiff had not for six months after commencement of the action moved for an interim injunction: *Held* that defendants were entitled to one month's notice of action under Public Health Act, 1875, s. 264.—*Flower v. Leyton Local Board*, 36 L.T. 286; 25 W.R. 423.

- (xii.) **App. Div. Ct.**—*Voting Paper.*—A candidate against whom votes have been fabricated is a party aggrieved within Public Health Act, 1875, s. 253.—*Verdin v. Wray*, 46 L.J. M.C. 170; 35 L.T. 942; 25 W.R. 274.

Negligence:—

- (ii.) **C. A.**—*Horse Mart.*—A horse, led by a halter at a horse mart to show his paces, was suddenly struck by defendant's servant, and, there being no barrier, swerved and kicked, and thereby injured plaintiff: *Held*, reversing decision of Ex. Div., that there was no evidence on which a jury could find negligence.—*Abbott v. Freeman*, 35 L.T. 783.

Newfoundland, Law of:—

- (i.) **P. C.**—*Telegraph—Monopoly—Bay—Thres-miles Limit.*—Where the Legislature gave to a telegraph company a monopoly for fifty years: *Held* that the laying down by another company of a cable within a well-defined bay on the coast of Newfoundland, but more than three miles from the shore, was, upon the construction of the Act constituting the monopoly, an infringement of the monopoly.—*Direct United States Cable Co. v. Anglo-American Telegraph Co.*, 36 L.T. 265.

Nuisance:—

- (viii.) **C. P. Div.**—*Sewage—Escape—Occupier's Liability.*—Occupier of house is liable, even in absence of knowledge or negligence, for escape of sewage from a defective drain under his house to adjoining premises.—*Humphreys v. Cousins*, 36 L.T. 180; 25 W.R. 371.

Partition:—

- (ii.) **Ch. Div. V. C. H.**—*Sale.*—Where owner of undivided share of property claims a sale, the fact that another part owner is in occupation of part of the premises and would find difficulty in obtaining premises suitable for his business elsewhere in the neighbourhood, is not good reason to contrary within 31 & 32 Vict., c. 40, s. 4.—*Roughton v. Gibson*, 36 L.T. 93; 25 W.R. 269.
- (iii.) **Ch. Div. V. C. H.**—*Sale of Leaseholds—Infant.*—Where plaintiff, entitled to undivided moiety of leaseholds, claimed a sale: *Held* that the probability that the income of an infant entitled to the other moiety would be thereby diminished was not a "good reason to the contrary" within 31 and 32 Vict., c. 40, s. 4.—*Rowe v. Gray*, 25 W.R. 250.
- (iv.) **Ch. Div. M. R.**—*Sale of Leaseholds—Investment—Right of Tenant for Life.*—Proceeds of leaseholds, sold by order of the Court in a partition suit, were invested and produced an income less than the yearly rents of the leaseholds: *Held* that a tenant for life of the leaseholds was not entitled to any allowance out of corpus of proceeds of sale to make up deficiency in her income: also that such proceeds could not be invested in East India stock.—*Langmead v. Cockerton*, 25 W.R. 31.

Partnership:—

- (iii.) **Ch. Div. V. C. B.**—*Expiration of Term—Continuation.*—Where a partnership is continued after expiration of term, the assumption that it continues on the same footing as before only extends to such of the articles of the partnership as are properly applicable to the new contract.—*Hogg v. Hogg*, 35 L.T. 792.

Patent:—

- (xiv.) **Ch. Div. V. C. B.**—*Infringement.*—Plaintiffs were patentees of wooden stoppers for soda-water bottles, such stoppers being of greater specific gravity than water, and self-adjusting as the bottle was filled: Defendants took out patent for wooden stoppers of less specific gravity than water, adjusted, as the bottle filled, by means of a removeable metal clip: *Held* that defendants' stopper was a colourable evasion of plaintiffs' patent.—*Barrett v. Vernon*, 25 W.R. 343.
- (xv.) **Ch. Div. M. R.**—*Novelty—Ambiguity of Claim.*—Where, upon the natural construction of the claim, a patent was bad for want of novelty: *Held* that patentee was not entitled to refer to the description in and drawing accompanying the specification for the purpose of validating the patent.—*Hinks & Son v. Safety Lighting Co.*, L.R. 4 Ch. D. 607; 46 L.J. Ch. 185.

Peerage:—

- (i.) **H. L.**—*Shifting Clause.*—*Held* that the validity of a patent of Peerage is not destroyed by invalidity of a single clause: also that a clause in a patent shifting a peerage on the happening of a certain event from the existing peer to another person was invalid.—*The Buckhurst Peerage*, L.R. 2 App. 1.

Petition of Right:—

- (iii.) **C. A.**—*Crown Prerogative—Treaty.*—*Held* (affirming decision of Q.B. Div., see Petition of Right (ii.), p. 22) that the Sovereign is not agent or trustee for her subjects, and that a petition of right will not lie to recover money received under a treaty with a foreign power on account of debts to British subjects.—*Rustomjee v. The Queen*, L.R. 2 Q.B. Div. 69; 46 L.J. Q.B. 288; 36 L.T. 190; 25 W.R. 333.

Poor Law:—

- (viii.) **C. A.**—*Rateability—Corporation Property.*—The rateable value of property occupied by a public corporation for public purposes must be ascertained with reference to the profits actually earned.—*Mayor, &c., of Worcester v. Droitwich Union*, L.R. 2 Ex. D. 49; 36 L.T. 186; 25 W.R. 336.
- (ix.) **Q. B. Div.**—*Rateability—Market Tolls—First Charge.*—By local Act appellants were authorised to regulate markets at B. and receive the whole of the tolls, subject to payment thereout to the corporation of £210 per annum as a first charge thereon: *Held* that appellants were not entitled to deduct such annual sum in assessment of rateable value.—*Brecon Markets Co. v. St. Mary's Brecon*, 36 L.T. 109.
- (x.) **App. Div. Ct.**—*Rateability—Mine.*—Where a mine was drowned out and yielding no profits: *Held* that the land was rateable at its value to a yearly tenant, and that the engine-house, machinery, and plant must be assessed at their value (if any) independent of the mine.—*Tyne Coal Co. v. Overseers of Wallsend*, 35 L.T. 854.
- (xi.) **H. L.**—*Rateability—Moorings—Thames.*—C. obtained permission to lay down moorings for two derricks in the River Thames, under a resolution of the Conservators, whereby it was provided that the work was to be done to the satisfaction of the Conservators, subject to payment of rent and to removal, if required by the Conservators, under s. 91 of the

Thames Conservancy Act, 1857: *Held* (affirming decision of C. A., see Poor Law (v.), p. 65) that, having regard to the nature of the arrangement and of the construction of the moorings, C. was liable to be rated in respect of them.—*Cory v. Bristow*, 25 W.R. 383.

- (xii.) C. P. Div.—*Rateability—Pier*.—A portion of a flying pier below low-water mark is wholly beyond the jurisdiction, and not rateable.—*Black-pool Pier Co. v. Fylde Union*, 36 L.T., 251.
- (xiii.) Q. B. Div.—*Rateability—Woods*.—Under the Rating Act, 37 & 38 Vict., c. 54, s. 4, woodlands are rateable according to their value in their natural unimproved state.—*Earl of Westmoreland v. Southwick*, 36 L.T. 109.

Practice:—

- (xxxvii.) C. A.—*Appeal—Costs*.—Where a respondent who had not been allowed costs in the Court below did not give notice of his intention to raise the question on the appeal under Ord. 58, r. 6: *Held* that he could not on the appeal ask for his costs.—*Harris v. Aaron*, 36 L.T. 43; 25 W.R. 353.
- (xxxviii.) C. A.—*Appeal—Costs*.—Where notice of motion of appeal has been given, but proper steps under Ord. 58, r. 8 have not been taken, so that the case is not in the paper for the day, the other party, without appearing must make a substantive application for costs of motion.—*Webb v. Mansel*, L.R. 2 Q.B.D. 117; 25 W.R. 389.
- (xxxix.) C. A.—*Appeal—Costs—Admiralty Action*.—Where Court of Appeal varied a decision of the Adm. Div. by finding that not one vessel, but both were to blame for a collision, both parties were ordered to pay their own costs in the Court below and in the Appeal Court.—*The Corinna*, 35 L. T. 781.
- (xli.) C. A.—*Appeal—Costs—Admiralty Action*.—Where the Court of Appeal varied decision of Adm. Div. by holding that a collision was not owing to one of the parties, but to inevitable accident, both parties were ordered to pay their own costs.—*The City of Cambridge*, 35 L.T. 781.
- (xlii.) C. A.—*Appeal—Direction to Jury*.—On appealing against a judge's direction to a jury, the proper mode of proceeding is to give ordinary notice of appeal.—*Chesse v. Lovejoy*, 25 W.R. 453.
- (xliii.) C. A.—*Appeal—Dissolution Suit—Custody of Children*.—An appeal from an order as to the custody of children, made after final decree for dissolution of marriage, lies to the Full Court of the Divorce Division, whose decision is final.—*Gladstone v. Gladstone*, 25 W.R. 387.
- (xliiii.) C. A.—*Appeal—Dissolution Suit—Order refusing New Trial*.—An appeal from an order made in a suit for dissolution of marriage, refusing an application for a new trial, lies to the Full Court of the Divorce Division, whose decision is final.—*Robinson v. Robinson*, 36 L.T. 122; 25 W.R. 388.
- (cxlv.) C. A.—*Appeal—Security for Costs*.—Order nisi of Divisional Court of Appeal requiring a County Court Judge to show cause why he should not sign case for appeal from his decision, was discharged after cause shown, and defendants again appealed: on proof that taxed costs already occasioned had not been paid, the Court ordered the appeal to be stayed till payment of a deposit into Court as security for the costs.—*Clarke v. Roche*, 36 L.T. 78; 25 W.R. 309.
- (cxlvi.) C. A.—*Appeal—Security for Costs—Delay*.—Where appellant delayed for nine months to comply with order to give security for costs, the appeal was dismissed on respondent's application for want of prosecution.—*Judd v. Green*, 35 L.T. 873; 25 W.R. 293.
- (cxlvii.) C. A.—*Appeal—Separation Suit—Interlocutory Order*.—An appeal

from an interlocutory order made in Chambers in a suit for judicial separation, lies to the Full Court of the Divorce Division, whose decision is final.—*Wallis v. Wallis*, 36 L.T. 161; 25 W.R. 387.

- (cxlvii.) C. A.—*Appeal—Time*.—Notice of appeal from order made under Trustee Relief Act must, under Ord. 58, rr. 9, 15, be given within twenty-one days of the perfecting of the order or of refusal of the application.—*Re Baillie's Trusts*, 35 L.T. 917; 25 W.R. 310.
- (cxlviii.) C. A.—*Appeal—Time*.—Time for appeal begins to run from refusal of an interlocutory application, though such refusal and an order on further consideration are embodied in one order.—*Cummins v. Heron*, 36 L.T. 41; 25 W.R. 325.
- (cxlix.) C. A.—*Appeal—Time*.—Similar decision.—*White v. Witt*, 36 L.T. 123; 25 W.R. 485.
- (cl.) C. A.—*Appeal in Bankruptcy—Time*.—In bankruptcy appeals, notice of motion for appeal must be given within twenty-one days of signature or refusal of order, inclusive of Sundays.—*Re Gilbert, Ex parte Viney*, 36 L.T. 43; 25 W.R. 364.
- (cli.) C. A.—*Appeal from Chambers—Time*.—Held that notice of appeal from Chambers for a day when the Court did not sit, and more than eight days after the decision appealed against, was bad, although the Vacation commenced within the eight days.—*Deykin v. Coleman*, 36 L.T. 195; 24 W.R. 294.
- (clii.) C. A.—*Appeal to House of Lords—Leave*.—The Court will not give leave to appeal to the House of Lords unless of opinion that there is a question of law of sufficient importance to justify such appeal.—*In re Turner, Ex parte Attwater*, 35 L.T. 917; 25 W.R. 328.
- (cliii.) P. C.—*Appeal to Privy Council—Costs*.—An appeal to her Majesty in Council cannot be brought on a mere question of costs.—*Credit Foncier of Mauritius v. Patureau*, 35 L.T. 869.
- (cliv.) C. A.—*Appearance—Admiralty Action*.—Held that the old practice of the High Court of Admiralty as to appearances under protest is still in force in Admiralty actions.—*The Vivar*, L.R. 2 P.D. 29; 35 L.T. 782; 25 W.R. 453.
- (clv.) Ch. Div. V. C. M.—*Attachment—Contempt*.—Held that the circulation by plaintiff among defendant's business correspondents of a statement of claim, charging defendant with unfair and over-reaching conduct, amounted to contempt of Court, and that plaintiff must pay cost of motion to commit; and injunction granted.—*Bowden v. Russell*, 36 L.T. 177.
- (clvi.) C. P. Div.—*Costs*.—Costs under Ord. 55 follow the event in all jury cases irrespective of amount recovered, except only cases within the provisions of County Courts Act, 1867, expressly preserved by Judicature Act, 1873, s. 67.—*Parsons v. Tinsling*, L.R. 2 C.P.D. 119; 46 L.J. O.P. 239; 35 L.T. 851; 25 W.R. 255.
- (clvii.) Ch. Div.—*Costs—Abandoned Motion*.—On *ex parte* application made at the close of the seal the Court allowed costs of abandoned motion.—*Yetts v. Biles*, 25 W.R. 452.
- (clviii.) Ch. Div. V. C. M.—*Costs—Abandoned Motion*.—The Court refused costs of an abandoned motion, where counsel instructed to ask for them had omitted to give notice to the other side.—*Aitken v. Dunbar*, 25 W.R. 366.
- (clix.) Ex. Div.—*Costs—Counter-claim*.—A plaintiff whose claim is reduced by proof of a counter-claim recovers judgment only for the balance, and the question of costs is decided according to such balance, under County Court Act, 1875, s. 5.—*Staples v. Young*, 25 W.R. 304.

- (clx.) **P. D. A. Div.—Costs—Discontinuance.**—Where plaintiff after succeeding in an interlocutory application, the costs of which are made costs in the cause, gives notice of discontinuance, defendant is under rules of Supreme Court, Ord. 23, entitled to costs including costs of the interlocutory application.—*The St. Olaf*, 36 L.T. 30.
- (clxi.) **C. P. Div.—Costs—Interest.**—Interest on costs runs from date of taxing master's certificate.—*Schroder v. Clough*, 35 L.T. 850.
- (clxii.) **Ex. Div.—Costs—Payment into Court.**—Where defendant pays money into Court, plaintiff is entitled to his costs up to that time provided he takes the money out under Ord. 30 in satisfaction of his claim.—*Langridge v. Campbell*, L.R. 2 Ex. D. 281; 36 L.T. 64; 25 W.R. 351.
- (clxiii.) **Q. B. Div.—Costs—Reference.**—Where a cause is referred to master, under Common Law Procedure Act, 1854, s. 3, with powers of certifying of a judge at *Nisi Prius*, he cannot certify for costs after award has been taken up, unless the case is remitted to him by the Court.—*Bedwell v. Wood*, 36 L.T., 213.
- (clxiv.) **P. D. A. Div.—Costs—Security.**—Where plaintiff has assigned all his property for benefit of his creditors, he will generally be required to give security for costs.—*The Lake Megantic*, 36 L.T. 183.
- (clxv.) **Ch. Div. V. C. M.—Disclaimer—Costs.**—By order of pension, leave was given for assignment of chambers in Gray's Inn to A. in trust for B., who mortgaged his interest to C., with notice to A. of such mortgage: A.'s name was never substituted for that of assignor in the books of the society, and by an order of pension in 1873 the previous order was rescinded: A. gave no notice to C. of such last-mentioned order: C. brought foreclosure suit, to which A. put in answer disclaiming all interest: Held that the bill must be dismissed as against A. without costs.—*Slipper v. Gough*, 36 L.T. 92.
- (clxvi.) **C. P. Div.—Discovery—Interrogatories—Ord. 31, rr. 4, 5.**—A railway company were ordered to give discovery as to entries in their books for several years past as to delivery of goods to them for carriage.—*Hall v. London & N. W. Rail. Co.*, 35 L.T. 848.
- (clxvii.) **Ch. Div. V. C. H.—District Registry—Chancery Actions—Powers of Registrars.**—Chancery actions, notwithstanding Ord. 35, r. 1a, must be set down for trial in London: district registrars have no power to appoint receivers or open banking accounts, or, except by special direction of judge, to take accounts in administrative action.—*Re Smith. Hutchinson v. Wood*, 36 L.T. 178; 25 W.R. 452.
- (clxviii.) **Ch. Div. V. C. H.—Evidence—Affidavit.**—A schedule forming part of an affidavit cannot, except by order of the Court, be filed by the record and writ clerks unless it is printed under Ord. 31, r. 7, but the schedule may be made an exhibit, and the affidavit need then alone be printed.—*Webb v. Bomford*, 25 W.R. 251.
- (clxix.) **Ch. Div. V. C. M.—Interlocutory Order.**—Order granted *ex parte* for entry to inspect and take samples under Ord. 52, r. 3.—*Hennessey & Co. v. Rohmann, Osborne & Co.*, 36 L.T. 51.
- (clxx.) **C. A.—Leave to Sign Judgment.**—An application under Ord. 14, r. 1, that defendant be called on to show cause why final judgment should not be entered against him, must be supported by affidavit of plaintiff of his belief that there is no defence.—*Frederici v. Vandersee*, L.R. 2 Q.B.D. 70; 46 L.J. C.P. 194; 35 L.T. 889; 25 W.R. 399.
- (clxxi.) **Ch. Div. M. R.—Motion for Judgment—Dismissal.**—Notice of motion to dismiss for want of prosecution, where plaintiff has become bankrupt, must be served on his trustees.—*Wright v. Swindon, Marlborough, & Andover Rail. Co.*, L.R. 4 Ch. D. 164; 46 L.J. Ch. 199.
- (clxxii.) **C. A.—Motion for Judgment—Discretion of Judge.**—It is within dis-

cretion of the Court to grant or refuse relief claimed on motion for judgment upon the admissions in pleadings under Ord. 40, r. 11.—*Mellor v. Sidebottom*, 25 W.R. 401.

- (olxxiii.) **Ch. Div. M. R.**—*Parties—Joinder*.—Ord. 16, r. 3, does not permit a person to be joined as defendant to a counter-claim against whom relief is claimed in one of two inconsistent alternatives.—*Evans v. Buck*, L.R. 4 Ch. D. 484; 46 L.J. Ch. 157; 25 W.R. 392.
- (olxxiv.) **Ex. Div.**—*Parties—Joinder*.—A third person brought in as a party to an action, under Ord. 16, rr. 17, 18, is entitled, under Judicature Act 1873, s. 24, sub-sec. 8, to serve notice and bring in a fourth party claiming against him.—*Fowler v. Kneop*, 86 L.T. 219.
- (olxxv.) **C. A.**—*Parties—Joinder—Alternative Relief*.—In action against L. for non-performance of contract made by T. in name of L., when L. denied having given authority to contract as alleged by statement of claim: *Held* that plaintiff was entitled to join T. as defendant, and to claim alternative relief against him or L.—*Honduras Oceanic Rail. Co. v. Le Fevre & Tucker*, 86 L.T. 46; 25 W.R. 310.
- (olxxvi.) **Ch. Div. M. R.**—*Parties—Joinder—Consolidation*.—After consolidation of two actions a new defendant was, under Ord. 16, rr. 14, 15, ordered to be added without service of any writ, and a present defendant to be made a party in a representative character without further indorsement of any writ, unless cause to the contrary should be shown within eight days.—*Re Wortley*, L.R. 4 Ch. 180; 46 L.J. Ch. 182; 25 W.R. 295.
- (olxxvii.) **C. P. Div.**—*Parties—Joinder*.—Ord. 16, r. 13.—A plaintiff is not at liberty, on grounds of his own convenience, to add as defendants persons against whom he does not intend to set up any claim.—*Norris v. Beasley*, L.R. 2 C.P.D. 80; 46 L.J.C.P. 169; 35 L.T. 845; 25 W.R. 320.
- (olxxviii.) **C. A.**—*Parties—Third Party Notice*.—*Held*, reversing decision of Q. B. Div., that third party notice, under Ord. 16, r. 18, may be given wherever there is *prima facie* a material question which is common as between plaintiff and defendant, and as between defendant and the third party, and which may be advantageously decided in the action, without prejudice or delay to plaintiff.—*Swansea Shipping Co. v. Duncan, Fox, & Co.*, 85 L.T. 879; 25 W.R. 238.
- (olxxix.) **Ch. Div. M. R.**—*Parties—Wrong Plaintiff—Mistake in Law*.—Ord. 16, r. 2.—Where demurrer on ground that the wrong person was plaintiff was allowed, leave to amend was given: fraud being charged, the question of costs was reserved till the hearing.—*Duckett v. Gover*, 25 W.R. 455.
- (olxxx.) **Ch. Div. M. R.**—*Petition*.—Where four persons were entitled absolutely to property carried to a separate account in one suit, and one of such persons was entitled also to a fund standing to his separate account in another suit, an order was made for payment out of both funds on one petition instituted in both suits.—*Greenwood v. Greenwood; Bell v. Kettlewell*, 25 W.R. 316.
- (olxxxi.) **P. D. A. Div.**—*Pleading—Admiralty Action—Preliminary Acts*.—Ord. 19, r. 30, as to delivery of preliminary Acts does not apply to an action brought against a ship carrying cargo, for damage to the cargo by collision with another ship.—*The John Boyne*, 86 L.T. 29.
- (olxxxii.) **Ch. Div. V. C. B.**—*Pleadings—Amendment*.—Ord. 27, r. 1.—Court gave leave to amend statement of claim on payment of costs of application, without enquiring as to materiality of proposed amendment.—*Chesterfield Co. v. Black*, 25 W.R. 409.
- (olxxxiii.) **Ex. Div.**—*Pleading—Counter-claim*.—Where several plaintiffs put in a joint claim defendant may, under Judicature Act, 1873, s. 24, and under Ord. 16, rr. 1, 3, and Ord. 19, r. 3, set up a separate counter-claim

sounding in damages against each plaintiff.—*Manchester, Sheffield, and Lincolnshire Rail. Co. v. Brooks*, L.R. 2 Ex. D. 243; 46 L. J. Ex. 244; 36 L.T. 103; 25 W.R. 413.

- (clxxxiv.) **Ch. Div. M. R.**—*Pleading—Counter-claim*.—A claim by defendant against co-defendant for indemnity cannot be set up by counter-claim.—*Furniss v. Booth*, L.R. 4 Ch. D. 586; 46 L.J. Ch. 112; 25 W.R. 287.
- (clxxxv.) **P. D. A. Div.**—*Pleading—Counterclaim—Collision Case*.—Defendant in a collision case, resident out of jurisdiction, making a counter-claim for damage to his own ship, must give security for the whole costs of the action, otherwise his counter-claim will be dismissed.—*The Julia Fisher*, 36 L.T. 257.
- (clxxxvi.) **C. P. Div.**—*Pleading—Mistake—Rectification*.—Where pleadings show that a contract was reduced to writing by mutual mistake of parties, the Court will treat the contract as reformed.—*Breslauer v. Barwick*, 36 L.T. 52; 24 W.R. 901.
- (clxxxvii.) **C. A.**—*Pleading—Reply*.—In action for specific performance defendant pleaded breaches of agreement by plaintiff, whereby contract was avoided: *Held* (reversing decision of V. C. B., see Practice (cxiii.), p. 68) that plaintiff was entitled in his reply to state what facts he pleased, not being scandalous or irrelevant, to meet a defence by confession and avoidance.—*Hall v. Eve*, 35 L. T. 926.
- (clxxxviii.) **C. A.**—*Referee—Question of Fraud*.—A case involving questions of fraud and the character and reputation of the parties will not, except by consent, be sent for trial before Official Referee.—*Leigh v. Brooks*, 25 W.R. 401.
- (clxxxix.) **App. Div. Ct.**—*Service out of Jurisdiction—Manager of Firm—Ord. 9, r. 6 a.*—Service may be effected on the manager of a defendant who is out of the jurisdiction, if such defendant carries on business under the name of a firm having a place of business within the jurisdiction. — *O'Neil v. Clason*, 46 L.J. C.P. 191.
- (cxc.) **C. A.**—*Service out of Jurisdiction—Ord. 11, rr. 1, 3.*—Affidavit in support of application for order for service out of jurisdiction must show that cause of action arose within the jurisdiction: Order of V. C. M. see Practice (cxxxiii.), p. 69, discharged.—*Great Australian Gold Mining Co. v. Martin*, 35 L.T. 874; 25 W.R. 246.
- (cxci.) **C. A.**—*Special Case—Ord. 34, r. 2.*—Decision of Q.B. Div. see Practice (lrv.), p. 28, affirmed.—*Metropolitan Board of Works v. New River Co.*, L.R. 2 Q.B.D. 67; 46 L.J. Q.B. 183.
- (cxcii.) **App. Div. Ct.**—*Time—Enlargement—Ord. 57, r. 6.*—Where defendant's solicitor, after entering appearance, neglected the action, so that judgment was given against defendant by default, the Court, on the application of defendant, made more than six days after the trial, but within six days of his first hearing thereof, granted enlargement of time to enable defendant to move to set aside the judgment.—*Michell v. Wilson*, 25 W.R. 380.
- (cxci.) **C. A.**—*Transfer of Action*.—An action was commenced in Ex. Div. for remission of contract for sale of land and recovery of deposit: vendor filed counter-claim for specific performance: *Held* that, on vendor's application, the action must be transferred to Ch. Div.—*Holloway v. York*, 25 W.R. 403.
- (cxci.) **Ch. Div. V. C. B.**—*Trial—Default of Appearance*.—Where an action being called on for trial, no papers had been delivered and plaintiff did not appear: the Court dismissed the action with costs.—*Furrell v. Wale*, 36 L.T. 95.
- (cxci.) **Ch. Div. V. C. M.**—*Trial—Jury*.—In a suit for remission of con-

- tract on ground of fraud: *Held* that the Court had discretion to order trial without a jury.—*Back v. Hay*, 36 L.T. 295; 25 W.R. 392.
- (cxvii.) **Ch. Div. V. C. B.**—*Trial by Jury—Discretion of Court.*—The Court will not exercise its discretion under Ord. 36, r. 26, to order trial without a jury, unless good reason is shown for the exercise of such discretion.—*West v. White*, L.R. 4 Ch. D. 681; 36 L.T. 95; 25 W.R. 342.
- (cxviii.) **Ch. Div. V. C. M.**—*Trial—Jury—Discretion of Court.*—*Held* in a suit for specific performance that the Court has a discretionary power to refuse a trial by jury, and that the hearing must be in Ch. Div. without a jury.—*Pilley v. Baylis*, 36 L.T. 296.
- (cxix.) **Ch. Div. M. R.**—*Writ—Renewal.*—The Court gave plaintiff leave to renew a writ which he had been unable to serve, though more than twelve months had elapsed since the date of the writ.—*In re Jones, Eyre v. Coz*, 25 W.R. 303.

Principal and Agent:—

- (ix.) **Ch. Div. M. R.**—*Broker—Custom of London—Dry Goods Market.*—Broker purchased goods from C. lying in docks for undisclosed principals, and endorsed delivery order to them, who deposited the same with plaintiffs to secure advances: plaintiffs lodged the order at defendant's city office, with request for warrants: on the same day, before notice of the delivery order had been received at the dock-house, the broker hearing that his principals had stopped payment, paid C. the price of the goods, applied for and obtained the warrants in the name of C., who endorsed the warrant to him, and gave him a second delivery order: *Held* that C.'s lien passed to the broker, who was entitled to retain the goods.—*Imperial Bank v. London & St. Katharine's Dock Co.*, 36 L.T. 233
- (x.) **App. Div. Ct.**—*Factors Act—Agent Dealing as Principal.*—Where a factor had transferred to defendants who did not know him to be only an agent, goods of his principal in discharge of his own antecedent debt: *Held* that the Factors Act (6 Geo. 4, c. 94) did not require the sale to be by money actually passing, and that the value of the goods could not be recovered from defendants.—*Thackrah v. Fergusson*, 25 W.R. 307.
- (xi.) **C. P. Div.**—*Factors Act—Dock-warrants—Fraudulent Pledge.*—H. having purchased goods in bond, as agent for plaintiff, retained the dock-warrants, and deposited them with defendants as security for an advance to himself, and absconded: *Held* that H. was not "intrusted with the possession of goods," within the Factors Act, 6 Geo. 4, c. 94, and 5 & 6 Vict., c. 39.—*Johnson v. The Credit Lyonnais*, 36 L.T. 253.

Principal and Surety:—

- (vi.) **C. P. Div.**—*Discharge—Giving Time—Agreement.*—Ship was repaired by plaintiffs, by order of W. ship's husband, with authority of defendants and B., the co-owners: W. agreed with plaintiffs that the cost should be paid partly in cash, partly in good bills, and should be apportioned between owners in proportion to their shares: defendants paid the amount apportioned to them by cheque or cash, but B. by a bill at six months which was dishonoured: *Held* that defendants were bound by mode of payment adopted and were not discharged from liability by plaintiffs taking B.'s bill and giving him time.—*Mould v. Andrews*, 35 L.T. 813.

Probate:—

- (xii.) **P. D. A. Div.**—*Alterations—Lithographed Form.*—Testator made will on lithographed form, filling up the blank spaces, and making interlineations and obliterations: surviving witness could not say whether the interlineations and obliterations were on the will when he attested it,

- but they were necessary to carry into effect declarations of testator, made before the execution of the will: probate granted to will as altered.—*Dench v. Dench*, 46 L.J. P.D. & A. 18; 25 W.R. 414.
- (xiii.) **P. D. A. Div.**—*Attestation*.—Where attestation clause was informal, and the witness could not be found, on application of testator's daughter, who was alone entitled to take under an intestacy, the Court granted probate to her without affidavit of due execution.—*In the Goods of Huz*, 85 L.T. 900; 25 W.R. 273.
- (xiv.) **P. D. A. Div.**—*Executor*—"Either One"—*Sole Survivor*.—Testator bequeathed property to his three sisters, "or to such of them as are alive at the time of my death," and appointed "either one of them" his sole executrix: only one of his sisters survived him: probate was refused to the surviving sister.—*In the Goods of Blackwell*, 25 W.R. 305.
- (xv.) **P. D. A. Div.**—*Executor*—*Names in Blank*—*Evidence*.—Testator appointed to be one of his executors "Perceval _____, of Brighton, Esquire, the father": Held that evidence was admissible to ascertain who was the person designated, and probate granted to a Mr. William Perceval Boxall, a friend of the testator.—*In the Goods of De Rosas*, 46 L.J. P.D. & A. 6; 86 L.T. 263; 25 W.R. 352.
- (xvi.) **P. D. A. Div.**—*Executor according to Tenor*.—Testatrix appointed A. her executrix, "only requesting" that B. and C. would act for or with A.: Held that B., who alone survived testatrix, was executor according to the tenor.—*In the goods of Brown*, 25 W.R. 431.
- (xvii.) **P. D. A. Div.**—*Limited Grant*—*Draft of lost Will*.—When the will of a married woman, made with husband's consent, was lost, the Court granted probate to a draft limited till finding of the will, and also to such personality as was disposed of by the draft.—*In the goods of Alice Thrippleton*, 85 L.T. 909.
- (xviii.) **P. D. A. Div.**—*Revocation*—*Misdescription of Codicil*.—Testatrix executed a will in January, 1876, and a codicil in February, 1876, and a second will and codicil in 1877: the two wills were, with an exception, identical, but the second codicil, by a clerical mistake, purported to be a codicil to the will of January, 1876: the Court granted probate to the second will and codicil.—*In the goods of Ince*, 25 W.R. 396.
- (xix.) **P. D. A. Div.**—*Revocation*—*Conditional*—*Revival of earlier Will*.—A. executed a will in 1864: in 1874 he and his wife executed a joint will when starting on a railway journey in these words—"In case we should be called out of the world at one and the same time, and by the same accident, our wishes will be," &c., and containing usual clauses of revocation: A. afterwards died, leaving his wife surviving him: He'd that the first will was entitled to probate.—*In the goods of Hugo*, 25 W.R. 396.

Public Health:—

- (v.) **C. P. Div.**—*Drainage Board*—*Committee*.—A committee appointed by a drainage board under 24 & 25 Vict., c. 133, cannot delegate their powers to individual members.—*Cook v. Ward*, 25 W.R. 350.
- (vi.) **Q. B. Div.**—*Justices*—*Power to state Case*—83 & 39 Vict., c. 55.—Justices have no power to state a case on refusing order for local authority to enter premises under Public Health Act, 1875, s. 305.—*Diss Urban Sanitary Authority v. Aldrich*, L.R. 2 Q.B.D. 179.
- (vii.) **C. A.**—*Sewer*.—Held that on the construction of the Public Health Act, 1875, s. 16, the local authority may carry sewers on or over as well as under "lands," and that "lands" includes buildings.—*Roderick v. Local Board of Aston*, 36 L.T. 170; 25 W.R. 403.
- (viii.) **App. Div. Ct.**—*Vaccination*—30 & 31 Vict., c. 84; 34 & 35 Vict., c. 98.—Where a child has had small-pox, no certificate to that effect

is required to be transmitted.—*Broadhead, Appellant, v. Holdsworth, Respondent*, 46 L.J. M.C. 172; 25 W.R. 306.

Railway:—

- (xxii.) **App. Div. Ct.—Carrier—Negligence.**—Held that a judge cannot non-suit plaintiff on ground that he has not proved damage, without taking into account question of breach of contract or negligence.—*Roberts v. Midland Rail. Co.*, 25 W.R. 323.
- (xxiii.) **C. A.—Carriers—Passengers' Luggage—Steam Packet.**—Decision of Ex. Div., see *Railway Company (iv.)*, p. 31, affirmed.—*Cohen v. South Eastern Rail. Co.*, L.R. 2 Ex. D. 253; 36 L.T. 130; 25 W.R. 475.
- (xxiv.) **C. A.—Level Crossing—Private Right of Way.**—Plaintiffs under a contract with a railway company were entitled for themselves, their heirs, tenants, and assigns, with their horses, carts, &c., to "free way of passage" over a level crossing, whereon there was also then a public footway: subsequently a private Act was passed whereby "all rights of way" over the crossing were extinguished: Held, on the construction of the Act, that it only affected public rights, and that plaintiffs were entitled to injunction restraining company from blocking up the crossing.—*Wells v. London, Tilbury, and Southend Rail. Co.*, 25 W.R. 325.
- (xxv.) **C. A.—Regulation of Railways Act, 1842, s. 6—Board of Trade—Report of Inspector.**—Decision of M. R., see *Railway (xi.)*, p. 32, affirmed.—*Attorney-General v. Gt. Western Rail. Co.*, 46 L.J. Ch. 192; 35 L.T. 921; 25 W.R. 330.
- (xxvi.) **Q. B. Div.—Undue Preference.**—Defendants gratuitously carted goods of A., B., and C., and allowed to them a rebate which was allowed to them by rival railway companies in respect of sidings: Held that D., being charged for cartage and allowed no rebate, could maintain action for undue preference.—*Evershed v. L. & N. W. Rail. Co.*, 36 L.T. 12; 25 W.R. 411.

Revenue:—

- (vi.) **Ex. Div.—Inhabited House Duty.**—Held that houses used for professional purposes in which a care-taker sleeps at night are not exempted by 32 & 33 Vict., c. 14, s. 11, from Inhabited House Duty.—*Keene v. Dashwood*, 36 L.T. 215.
- (vii.) **Q. B. Div.—Land Tax—Hospital.**—The exemption of the site of a hospital from Land Tax ceases on removal of the hospital.—*Rabbits v. Cox*, 46 L.J. Q.B. 207; 35 L.T. 834; 25 W.R. 252.
- (viii.) **Ch. Div. M. R.—Succession Duty.**—A remainder-man settled his remainder on himself for life, with remainders over, and on death of previous tenant for life paid the whole of the Succession Duty: Held that he was entitled to have such duty raised out of the capital of the fund.—*Cuddon v. Cuddon*, L.R. 4 Ch. D. 583; 25 W.R. 341.

Scotland, Law of:—

- (v.) **H. L.—Appeal to House of Lords—Court of Justiciary.**—There is no appeal to H.L. from the High Court of Justiciary in Scotland.—*Mackintosh v. The Lord Advocate*, L.R. 2 App. 41.
- (vi.) **H. L.—Churchyard—Enlargement.**—Held that an order of Presbytery for enlargement of churchyard, made after sufficient notice, cannot be impeached for informality.—*Walker v. Presbytery of Arbroath*, L.R. 2 App. 79.

Settlement:—

- (xxiv.) **Ch. Div. V. C. H.—Covenant to Settle after-acquired Property.**—In construing a covenant to settle after-acquired property the words "during the coverture" will be implied, even though the covenant

refers expressly to specific property.—*Re Campbell's Policy Trusts*, 46 L.J. Ch. 142; 25 W.R. 268.

- (xxv.) **Ch. Div. M. R.**—*Custody of Deeds—Tenant for Life*.—Court will not interfere with right of legal tenant for life to custody of title deeds except where danger to the deeds is apprehended or when they are required for carrying out trusts under administration of the Court.—*Leathes v. Lenthies*, 25 W.R. 492.
- (xxvi.) **Ch. Div. V. C. B.**—*Volunteer—Widower's Son*.—A marriage settlement contained a limitation of property of the husband in favour of his son by a former marriage: *Held* that such limitation was void as against a subsequent purchaser from the husband.—*Price v. Jenkins*, L.R. 4 Ch. D. 483; 46 L.J. Ch. 214; 36 L.T. 237; 25 W.R. 427.

Ships:—

- (xlv.) **App. Div. Ct.**—*Bill of Lading—Construction—Leakage*.—The words "not accountable for leakage" in a bill of lading do not exempt from liability for damage to packages other than the leaky package.—*Thrift v. Youle*, 36 L.T. 114.
- (xlv.) **App. Div. Ct.**—*Bill of Lading—"Freight"*.—Evidence is not admissible to explain meaning of "freight;" "freight payable in London" fixes the place, but not time of payment.—*Krall v. Burnett*, 25 W.R. 305.
- (xlvii.) **C. P. Div.**—*Charter-party—Bill of Lading—Construction*.—Defendants chartered plaintiff's ship to carry cargo: charter-party provided for cesser of charterer's liability on loading, and advance of freight with demurrage at C. paid: bill of lading contained no such restriction: *Held* that both documents must be taken together, and that defendants' liability ceased on performance of condition of charter-party.—*Barwick v. Burnyeat & Co.*, 36 L.T., 250; 25 W.R. 395.
- (xlviii.) **Q. B. Div.**—*Charter-party—Construction—Custom*.—By a charter-party consisting of a printed form, plaintiff chartered defendant's ship to load cargo at Trinidad, "to be brought to and taken from alongside at merchant's risk and expense:" at the end of the form the words were appended in writing, "Cargo at Trinidad as customary:" *Held* that defendants were liable, under the custom of Trinidad, for lighterage at that port.—*Scrutton v. Childs*, 36 L.T. 212.
- (xlix.) **C. A.**—*Charter-party—Construction—Liability—Lien*.—Decision of C.P. Div., see Ship (xxvii.), p. 74, affirmed.—*French v. Gerber*, 25 W.R. 355.
- (l.) **C. A.**—*Charter-party—Time—Detention of Ship*.—Plaintiff chartered a ship for twelve months from a named date: owing to detention of the ship by Board of Trade, she was not ready to receive cargo till three months after the named date: *Held* that plaintiff was entitled to rescind the contract.—*Tully v. Howling*, L.R. 2 Q.B.D. 182; 35 L.T. 163; 25 W.R. 290.
- (li.) **Q. B. Div.**—*Charter-party—Warranty of Seaworthiness*.—A warranty of seaworthiness implied in a charter-party attaches at the time of sailing with cargo on board, and proof of seaworthiness at commencement of loading will not discharge the warranty.—*Cohen v. Davidson*, 36 L.T. 244; 25 W.R. 369.
- (lii.) **C. A.**—*Collision*.—*Held* that in a case of collision by night between a steamer and a barge, there was no presumption in law that the steamer was to blame.—*The Swallow*, 36 L.T. 231.
- (liii.) **P. D. A. Div.**—*Collision—Control of Dock-master*.—A vessel entering dock within the jurisdiction and under the directions of the dock-master is liable for damages from collision which might have been prevented by proper precautions on part of the master of the vessel.—*The Cynthia*, L.R. 2 P.D. 52; 36 L.T. 184.

- (liv.) **P. D. A. Div.**—*Collision—Dock-master's Authority*.—A vessel leaving dock under charge of pilot is liable for damage from collision occurring within dock-master's authority, and caused by defect of her tug, even though such tug is supplied by the dock company.—*The Belgic*, L.R. 2 P.D. 57; 35 L.T. 929.
- (lv.) **P. D. A. Div.**—*Collision—Inevitable Accident—Costs*.—Where a collision turns out to have been caused by an inevitable accident, each party will generally be ordered to pay their own costs, but where from the first such cause must have been obvious, the Court will in exercise of its discretion dismiss the action with costs.—*The Innisfail, The Secret*, 35 L.T. 819.
- (lvi.) **P. D. A. Div.**—*Collision—Limitation of Liability—Reference*.—In a collision case the defendants having admitted their liability and paid the amount thereof in Court, under the Merchant Shipping Act, 1862, s. 54, the Court ordered stay of proceedings save as regard a reference for purpose of ascertaining the respective amounts due to plaintiff and taxation of costs.—*The Expert*, 36 L.T. 258.
- (lvii.) **P. D. A. Div.**—*Collision—Moored Vessel*.—During a violent gale a steamer was driven from her moorings by a brig, and drifted, and ultimately came in contact with a barque, owners whereof brought action for damage against steamer: the steamer's chains were proved to have been unbent, and no look-out was kept on deck: *Held* that the steamer was liable for the damage.—*The Pladda*, L.R. 2 App. 34.
- (lviii.) **P. C.**—*Collision—Rule of Road*.—A ship missing stays must be got under control as soon as possible so as not to embarrass an approaching ship: a ship close hauled on starboard tack approaching another on the port tack is bound to keep away on discovering the other is unmanageable.—*The Lake St. Clair v. The Underwriter*, 36 L.T. 155.
- (lix.) **P. D. A.**—*Forfeiture—Bond Fide Purchase*.—A ship was claimed on behalf of the Crown, as forfeited for breaches of Merchant Shipping Act, 1854, s. 103; defendant in statement of defence that he had become the *bond fide* purchaser of the ship, without notice, after the alleged date of the offences and before the seizure of the ship: *Held* on demurrer that the ship was forfeited on the commission of the offence, and that the defence was bad.—*The Annandale*, 36 L.T. 259.
- (lx.) **C. A.**—*General Average*.—Decision of Q.B. Div., see Ship (xxxviii.), p. 75, affirmed.—*Robinson v. Price*, 25 W.R. 469.
- (lxi.) **P. C.**—*Hypothecation of Cargo*.—Master cannot bottomry ship or hypothecate cargo, without communicating with owner, if practicable, and stating necessity.—*Kleinworth & Co. v. Cassa Marittima, of Genoa*, L.R. 2 App. 156; 36 L.T. 118.
- (lxii.) **C. A.**—*Mortgage—Registration Effect of—Freight*.—Decision of O.P. Div., see Ship (xli.), p. 75, reversed.—*Keith v. Burrows*, 25 W.R. 446.
- (lxiii.) **Q. B. Div.**—*Naval Inquiry*.—Withdrawal of Board of Trade from inquiry under Merchant Shipping Acts before magistrate as to damage does not put an end to the inquiry.—*Ex parte Minto*, 35 L.T. 808; 25 W.R. 251.
- (lxiv.) **P. D. A. Div.**—*Salvage—Assignment*.—An assignment by a seaman of salvage reward already due is void under 17 & 18 Vict., c. 104, s. 182, and a defence setting up such assignment in an action for distribution of salvage is bad on demurrer.—*The Rosario*, L.R. 2 P.D. 41; 35 L.T. 816.
- (lxv.) **C. A.**—*Salvage—Inequitable Agreement*.—Decision of Adm. Div., see Ship (xxii.), p. 87, affirmed.—*The Medina*, L.R. 2 P.D. 5; 35 L.T. 779.
- (lxvi.) **P. D. A. Div.**—*Salvage—Jurisdiction of County Court*.—A County Court has jurisdiction to try suit of distribution of salvage where amount

of apportionment asked for does not exceed £300, though value of property saved exceeds £1000.—*The Glannibanta*, L.R. 2 P.D. 45; 36 L.T. 27.

- (lxvii.) **P. D. A.**—*Salvage—Uncompleted Service*.—Where ship A. was requested to aid ship B. in distress without amount of reward being fixed, and remained ready to give assistance all night, but in the morning ship C. offered and was engaged to tow ship B. into harbour for a less sum than ship A. would accept: *Held* that ship A. was entitled to fair compensation for service rendered and loss sustained.—*The Maude*, 36 L.T. 26.

Solicitor:—

- (ix.) **Ch. Div. M. R.**—*Articled Clerk—Service*.—Where an articled clerk entered into supplemental articles after his master's death and carried on his new master's business in their joint names, but under a verbal agreement that the clerk should receive a salary and pay over the profits: *Held* that under the circumstances of the case the service was sufficient under 6 & 7 Vict., c. 73.—*Ex parte Joyce*, L.R. 4 Ch. D. 596; 25 W.R. 840.
- (x.) **C. P. Div.**—*Contempt—Attachment—Striking off Rolls*.—If solicitor is guilty of contempt, the proper course is first to move for attachment: motion to strike off the rolls must be upon notice.—*Re a Solicitor*, 36 L.T. 113.

Telegraph:—

- (iii.) **C. P. Div.**—*Misdelivery—Damages*.—*Held* that a telegraph company, in absence of special contract or fraud on their part, are not liable to receiver of a telegram for damage arising from misdelivery.—*Dickson v. Reuter's Telegraph Co.*, L.R. 2 C.P.D. 62; 46 L.J. C.P. 197; 35 L.T. 842; 25 W.R. 272.

Title:—

- (ii.) **C. A.**—*Adverse Possession*.—Defendant, having with others right of way over a piece of land the property of the lord of the manor, ploughed up and used as his own a part of the land without interruption for more than twenty-one years: the remainder of the piece of land which was not fenced from the appropriated part was left in its original condition: *Held* that defendant had acquired a good title to the soil and minerals of and under the appropriated part, but not to the remainder of the soil or minerals.—*Seddon v. Smith*, 36 L.T. 168.

Trade:—

- (i.) **Ch. Div. V. C. B.**—*Breach of Covenant—Injunction*.—*Held* on the construction of a covenant not to carry on a particular trade, that the selling goods as a journeyman employed by a person engaged in such trade was a breach restrainable by injunction.—*Jones v. Heavens*, L.R. 4 Ch. D. 636; 25 W.R. 460.

Trade Mark:—

- (v.) **Ch. Div. V. C. B.**—*Expired Patent*.—S. C., deceased, and plaintiff, G. C., jointly took out Letters Patent for a filter, which they allowed to drop, but continued to affix to their filters, "G. C.'s improved patent gold medal, self-cleansing, rapid water filter, Boston:" defendant commenced to sell filters of similar shape, inscribed "S. C.'s patent prize medal, self-cleansing, rapid water filter, improved and manufactured by W. B. & Co.:" *Held* that plaintiffs had acquired a right to protection of their inscription as a trade mark, and that the use of "patent" therein did not avoid such right.—*Cheavin v. Walker*, 35 L.T. 757.
- (vi.) **Ch. Div. M. R.**—*Registration*.—Applicants had long used as trade

marks the initials of their firm, the name of their works, and abbreviations thereof, together with symbols or words denoting the quality of goods sold: the Patent Commissioners refused to allow the symbols and words to be registered: *Held* that the symbols and words, though not themselves trade marks, were, when taken in combination with the initials, etc., entitled to registration.—*Re Barrow's Application*, 36 L.T. 291; 25 W.R. 407.

Trustee:—

- (vii.) **Ch. Div. V. C. H.**—*Breach of Trust*.—A settled policy was held by a sole trustee who never endorsed any memorandum of settlement, or gave notice thereof to the office: he handed it over to a person who was intended to be appointed trustee in his place, but it found its way into the hands of the settlor who borrowed money on it, and finally the mortgagee surrendered it: *Held* that the original trustee was liable for the breach of trust.—*Kingdon v. Castleman*, 36 L.T. 141; 25 W.R. 345.
- (viii.) **Ch. Div. V. C. M.**—*Payment into Court—Trustees Relief Act*.—Trustees having unreasonably refused to pay over a fund to an executor without consent of the beneficiaries, and unnecessarily paid the money into Court, ordered to pay the costs of petition for payment out of the fund.—*Re Hoskins' Trusts*, 35 L.T. 935.

Vendor and Purchaser:—

- (viii.) **C. P. Div.**—*Auction—Puffing*.—Conditions of sale reserved right to vendor or his agent to bid once: the vendor did only bid once, but after the auctioneer had bid several times: *Held* that the purchaser was entitled to avoid the purchase.—*Parfitt v. Jepson*, 36 L.T. 251.
- (ix.) **C. A.**—*Lien*.—Agreement for sale of leaseholds to an intended company, on its formation, for £6,000 cash, and £2,000 in paid-up shares: the assignment was by deed stating consideration to be £6,000 to be paid, £50 per cent. out of proceeds of sale of shares, and £50 per cent. out of moneys borrowed by company: no shares were ever sold or money borrowed: on winding-up the company: *Held* that vendor's lien was excluded by the form of contract.—*Re Brentwood Brick & Coal Co.*, L.R. 4 Ch. D. 562; 25 W.R. 481.
- (x.) **C. A.**—*Price per Acre—Land Covered by Drain*.—B. agreed to purchase at a specified price per acre land described as bounded by a public drain, and containing twenty-three acres or thereabouts, but to be surveyed: the land including the drain *usque ad medium filum aquæ* measured 23a. Or. 26p., of which the land covered by drain comprised 1a. Or. 38p.: *Held* that if the land covered by the drain was comprised in the conveyance B. was bound to pay for it at the specified price per acre.—*Re Popple & Barratt's Contract*, 25 W.R. 248.
- (xi.) **Ch. Div. M. R.**—*Statute of Frauds—Description of Vendor*.—*Held* that in a contract for the sale of land the description of the vendors as "proprietors in possession" was sufficient.—*Rossiter v. Miller*, 46 L.J. Ch. 229.
- (xii.) **Q. B. Div.**—*Use and Occupation*.—Where contract provides that in case of non-completion of purchase by named date, the purchaser shall pay interest on the purchase-money and receive the rents and profits, an action for use and occupation will lie against a vendor remaining in occupation.—*Metropolitan Rail. Co. v. Defries*, L.R. 2 Q.B.D. 189; 36 L.T. 160; 25 W.R. 271.

Victoria, Law of:—

- (ii.) **P. C.**—*Grant of Lands—Crown Rights*.—A grant of wastelands in Victoria under Imperial Statute 5 & 6 Vict., c. 36, made before 1855, does not

transfer to grantee the rights of Crown in gold and silver found under the soil.—*Woolley v. Attorney-General of Victoria*, L.R. 2 App. 163; 36 L.T. 121.

Voluntary Gift:—

- (iii.) **Ch. Div. V. C. B.**—*Invalid Declaration of Trust—Resulting Trust.*—R. conveyed freeholds to C.: by the deed C. purported to pay a consideration, which, in fact, was never paid: R. continued to receive the rents till his death, after which C. executed a declaration that he held the property in trust for R.'s wife, who received the rents during her life, and purported to dispose of it by her will: *Held* that the declaration of trust was invalid, and that there was a resulting trust to the heir-at-law of the settlor.—*Rudkin v. Dolman*, 35 L.T. 791.

Warranty:

- (i.) **C. A.**—*Sale for Specific Purpose—Latent Defect.*—*Held*, reversing decision of Q.B. Div., that on sale of an article for a specific purpose, there is an implied warranty of its fitness for such purpose, without any exception as regards latent defects.—*Randall v. Newson*, L.R. 2 Q.B.D. 102; 46 L.J. Q.B. 259; 36 L.T. 164; 25 W.R. 313.

Will:—

- (lxxii.) **Ch. Div. V. C. B.**—*Construction—Annuity—Abatement.*—Testatrix gave several annuities, and directed that if her residue should be insufficient to pay them in full (which happened), all legacies above £100 should abate to "raise a further fund, and from the interest or income thereof to make up such deficiency." *Held* that the abatement must be permanent, so as to entitle residuary legatee to the corpus of the fund from which the annuities were payable, and that the "deficiency" must be ascertained by taking the residue as it stood with the intermediate interest twelve months after death of testatrix.—*Hichens v. Hichens*, 36 L.T. 8; 25 W.R. 249.
- (lxxiii.) **Ch. Div. M. R.**—*Construction—Forfeiture Clause.*—Bequest to A. for life, and after his death, to divide income among sons of B., so long as they should not deprive themselves of their interest in the fund, with gift over on such forfeiture: *Held* that a son of B., who became bankrupt, but obtained annulment of his bankruptcy during the life of A., did not forfeit his life interest.—*Re Parkham's Trusts*, 46 L.J. Ch. 80.
- (lxxiv.) **Ch. Div. V. C. H.**—*Construction—Maintenance—Discretion of Trustees.*—Gift on trust after death of testator's son to apply income for maintenance and support of any his widow for her life, and of his children until they should attain twenty-one, or marry, or of any or either such widow and children in such manner and proportions as the trustees should in their discretion think fit, and subject thereto on trust for children: son's widow married again without settling the income of the fund: son's youngest child attained twenty-one in 1870: *Held* that the trustees had discretion to pay income to widow for her separate use.—*Austin v. Austin* L.R. 4 Ch. 233; 46 L.J. Ch. 92; 36 L.T. 96; 25 W.R. 346.
- (lxxv.) **C. A.**—*Construction—"Other Daughters Surviving"—Period of Survivorship.*—Gift in trust for such of testator's daughters as should be living at his death: income of each daughter's share to be paid to her during her life, with remainder in trust for her children, and in default of issue for testator's "other daughters, or other daughter surviving." *Held* (reversing decision of V.C.H., see Will (lxxiii.), p. 80), that period of survivorship referred to death of any daughter without leaving children.—*Beckwith v. Beckwith*, 46 L.J. Ch. 97; 36 L.T. 123; 25 W.R. 282.
- (lxxvi.) **Ch. Div. V. C. M.**—*Construction—Period of Distribution.*—Gift

on trust for A. for life, and after his death the capital to be divided amongst the children of B. and their descendants, "but should there be none of them surviving," then as therein mentioned: *Held* that children of B. who survived testator took vested interests.—*Re Dawes' Trusts*, L.R. 4 Ch. D. 210.

- (lxxvii.) Ch. Div. V. C. M.—*Construction—Power*.—Testatrix, after giving certain specific legacies, bequeathed the residue of her personal estate, without reference to her power of appointment over certain property, amongst objects of the power and another person: she was entitled at her death to a reversionary interest in a trust fund, besides the property subject to the power: *Held* that the will did not operate as an execution of the power.—*Humphery v. Humphery*, 36 L.T. 91.
- (lxxviii.) Ch. Div. M. R.—*Construction—Power*.—Appointment of personality to two persons as joint tenants, of whom one was not an object of the power: *Held* that the object of the power took one moiety, and that the other moiety went as in default of appointment.—*Re Kerr's Trusts*, L.R. 4 Ch. D. 600; 25 W.R. 390.
- (lxxix.) Ch. Div. V. C. B.—*Construction—Power of Sale*.—*Held*, upon the construction of a will, that a power of sale therein contained, enabled the trustees and executors, after the death of a tenant for life, to sell and convey real estate devised by the will without the concurrence of the remaindermen.—*In re Cook's Contract*, L.R. 4 Ch. 454.
- (lxxx.) Ch. Div. M. R.—*Construction—Remoteness*.—Devise upon trust to pay income to testator's daughter during her life, and to the children during their lives, and in like manner to her children: *Held* that the gift to the unborn children of the daughter who was unmarried was not void for remoteness, and that the daughter took a life interest, and her children, if she should have any, would also take life interests, but that no decision could be given as to the ultimate remainder, being a future right.—*Hampton v. Holman*, 46 L.J. Ch. 248; 36 L.T. 237; 25 W.R. 459.
- (lxxxi.) Ch. Div. V. C. H.—*Construction—Renewal of Leaseholds*.—Testator gave leaseholds to A. for life, with remainders over, and gave his residuary personal estate upon trust for renewal of the leaseholds, and subject thereto to A. for life, &c.: testator had allowed the time for renewal of part of the leaseholds to pass before the date of the will, and allowed the time for renewal of the rest also to pass during his lifetime, and his executor was unable to effect a renewal: it was also found that a sum was due from testator under a covenant to repair in respect of dilapidations: *Held* that A. was entitled to enjoy the leaseholds in specie, as if there had been no direction to renew and to have the dilapidations paid for out of the corpus of the residuary personality.—*Pinfold v. Skillingfold*, 25 W.R. 426.
- (lxxxii.) Ch. Div. V. C. M.—*Construction—Residuary Bequest—Ejusdem generis*.—Bequest of "All I have power over, namely, plate," and other articles specifically enumerated: *Held* to pass the whole estate of testatrix.—*King v. George*, L.R. 4 Ch. D. 435; 35 L.T. 786; 25 W.R. 266.
- (lxxxiii.) Ch. Div. M. R.—*Construction—Residuary Bequest—Ejusdem generis*.—Bequest of "All my money, cattle, farming implements, &c.:" *Held* to pass the general residuary personal estate of testator.—*Chapman v. Chapman*, 46 L.J. Ch. 80.
- (lxxxiv.) Ch. Div. M. R.—*Construction—Residuary Gift—Trust Estate*.—*Held* that a devise of residuary real and personal estate after gifts of legacies does not pass trust estates in realty.—*Re Bellie's Estate*, 25 W.R. 456.
- (lxxxv.) Ex. Div.—*Construction—Residuary Bequest—Real Estate*.—*Held* that a bequest of "household furniture, linen, glass, china, plate, farming

stock, and all my personal estate and effects . . . or whatever I may be possessed of at my decease," was sufficient to pass real estate.—*Evans v. Jones*, 36 L.T. 218.

- (lxxxvi.) **Ch. Div. M. R.**—*Construction*.—"Survivors."—The rule of construction as to the word "survivors" where all the shares are settled applies also where some of the shares are settled and the others not settled, so that survivors means those who survive either by themselves or their stirpes.—*Lucena v. Lucena*, 36 L.T. 87.
- (lxxxvii.) **Ch. Div. V. C. H.**—*Illegitimate Children—Non-access*.—Testator gave property "in trust for all the children, or any, the child of B." a married woman, who then had issue one child born before marriage, one born shortly after her voluntary separation from her husband, and three born long afterwards while she was living with another man: the evidence of the husband was admitted to prove non-access, and these three children were consequently pronounced to be illegitimate, and it was held that as it was still possible for B. to have future legitimate children, the child born shortly after the separation was alone entitled to benefit by the gift.—*Re Yearwood's Trusts*, 25 W.R. 461.
- (lxxxviii.) **P. D. A. Div.**—*Lost Will—Evidence—Admissions Against Interest—Copy*.—A deed whereby a person mortgaged his life interest under a will was admitted as evidence of the existence of the will: a copy of the will found after fifty years among papers of an executor thereof was also admitted as evidence of the will.—*Sly v. Dredge*, 25 W.R. 463.
- (lxxxix.) **Ch. Div. V. C. H.**—*Presumption of Death*.—Testator gave property to his nephews living at his death, and the issue of such as should pre-decease him leaving issue, and died in 1858: one of his nephews emigrated in 1848, and occasionally wrote to his family till 1852, when nothing more was heard of him: Held that the nephew must be presumed to have died, without issue, before testator's death.—*In re Hanby*, 25 W.R. 426.
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Quarterly Digest

OF
ALL REPORTED CASES,
IN THE
Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,
FOR MAY, JUNE, AND JULY, 1877.
By L. G. GORDON ROBBINS, Barrister-at-Law.

Administration:—

- (xvii.) **Ch. Div. M. R.**—*Costs*.—Where there is gift of residue divisible amongst individuals and classes, the costs of ascertaining of whom such classes consist are payable out of the whole residue before distribution. *Re Reeve's trusts*, L.R. 4, Ch. D. 841; 25 W.R. 628.
- (xviii.) **P. D. A. Div.**—*Creditor*.—Letters of administration will not be granted to a creditor except on condition of his entering into a bond to administer rateably.—*In the goods of Brackenbury*, 36 L.T. 744, 25 W.R. 698.
- (xix.) **C. A.**—*Executors—Loss to estate—Liability*.—Testator's estate consisted partly of certain American bonds, the value of which fell continuously from his death until the hearing of the cause, three years afterwards: one of the residuary legatees had pressed the executors to sell, the other three had assented to postponement of the sale: *Held* that the executors were not liable to make good the loss.—*Marsden v. Kent*, 46 L.J. Ch. 497; 25 W.R. 522.
- (xx.) **Ch. Div. V. C. B.**—*Interest on Deduction for Advances*.—Bequest to son of share in residue subject to deduction for advances: *Held* that son was chargeable with interest at £4 per cent. from the death of testator on the amount to be deducted.—*Field v. Seward*, L.R. 5 Ch. 538.
- (xxi.) **Ch. Div. V. C. H.**—*Lease—Renewal*.—*Held* that expenses of renewal under a lessee's covenant of a lease part of a testator's estate, must be paid out of the general assets.—*Trail v. Jackson*, 25 W.R. 802.
- (xxii.) **Ch. Div. V. C. H.**—*Tenant for life—Premiums—Lien*.—Tenant for life of estate, investments of which the trustees had power to continue, paid for 33 years premiums on a life policy, part of the estate: *Held* that the policy moneys must be paid to the estate, the tenant for life having no lien.—*Re Waugh's trusts*, 25 W.R. 555.

Agreements and Contracts:—

- (xxvi.) **H. L.**—*Mercantile Contract—Rice to be Shipped during March and (or)*

April—Shipment Commenced in February.—Decision of C.A., Agreements and Contracts (xx.), p. 83, reversed.—*Bowes v. Shand*, 25 W.R. 730.

- (xxvii.) **Ex. Div.**—*Party Wall—Consideration.*—Held that the benefit derived from user of a party wall was a sufficient consideration and proof of an implied promise to pay a contribution towards expense of the wall.—*Christie v. Mitchison*, 36 L.T. 621.
- (xxviii.) **C. P. Div.**—*Rescission—Acceptance—Engineer's Certificate.*—A contract for supply of iron rails to a company provided that the work should be done to the satisfaction of their engineer: after delivery of the rails they were found to be defective: Held on the construction of the contract that the engineer's certificate was intended to be conclusive.—*Dunaberg & Witepsk Rail Co. v. Hopkins & Co.*, 36 L.T. 733.
- (xxix.) **C. A.**—*Rescission—Breach of Contract—Damages.*—In absence of fraud the court will not rescind or cancel an agreement in writing for sale of land: the measure of damages for breach of contract is the same in case of realty and chattels.—*Noble v. Edwards*, L.R. 5 Ch. 378; 36 L.T. 312.
- (xxx.) **C. P. Div.**—*Reversion—Condition—Construction—Time.*—Condition of sale of a reversion provided that interest should be payable in case of non-completion on day fixed, and that vendor might re-sell on breach of any condition: Held that time was not of essence of contract.—*Patrick v. Milner*, 36 L.T. 738; 25 W.R. 790.
- (xxxi.) **C. A.**—*Specific Performance—Statute of Frauds.*—Decision of V.C.M., Agreements and Contracts (xviii.), p. 46, affirmed.—*Ungley v. Ungley*, 25 W.R. 733.
- (xxxii.) **C. A.**—*Wager—Stakeholder*—8 & 9 Vict. c. 109.—When two persons agree to run a foot-race, and deposit money in hands of stakeholder to be paid over to winner, either party may recover from the stakeholder though he demands the money after the event. Decision of Ex. Div., reported 25 W.R. 607, reversed.—*Diggle v. Higgs*, 25 W.R. 777.
- (xxxiii.) **Q. B. Div.**—*Wager*—8 & 9 Vict., c. 109, s. 18.—Plaintiff agreed to take lease of a house of defendant and paid £25 deposit: defendant afterwards offered him £50 to be off his bargain: it was ultimately agreed that they should toss up whether defendant should pay £50 or £75 to be off: defendant won the toss: Held that plaintiff was entitled to recover the £50 and also the deposit.—*Wilson v. Cole*, 36 L.T. 703.

Arbitration:—

- (ii.) **C. A.**—*Appeal—Special Case.*—By an order of reference made by consent, before Judicature Acts, it was ordered that neither party should bring writ of error with regard to matters referred: the award was made subject to opinion of Court on special case: Court gave judgment for plaintiffs: Held that no appeal could be brought.—*Jones v. Victoria Graving Dock Co.*, L.R. 2 Q.B.D. 314; 36 L.T. 345; 25 W.R. 501.
- (iii.) **Q. B. D.**—*Appeal to Quarter Sessions—Costs—Taxation out of Sessions.*—A rate appeal to quarter sessions was referred by consent under 12 & 13 Vict. c. 45 s. 13, together with the question of the costs of the appeal and reference: the arbitrator gave award in favour of respondents with costs: the award was entered as judgment of sessions, and the costs taxed after the sessions, and an order subsequently drawn up confirming the rate and ordering the appellants to pay the costs so taxed: Held that the order was valid.—*Southampton Gas-Light & Coke Co. v. Guardians of Southampton*, L.R. 2 Q.B.D. 571; 36 L.T. 543; 25 W.R. 671.
- (iv.) **C. P. Div.**—*Costs of Reference—Jurisdiction.*—When order by consent provides that costs of action and application to refer are to abide event

of award, but is silent as to costs of reference, the arbitrator has no power to award them, but each party must pay his own costs thereof.—*Bullen v. King*, 36 L.T. 732.

- (v.) **C. A.**—*Motion to set aside Award—Time*—9 & 10 Will. 3, c. 15 s. 2.—A motion to set aside an award must still be made before the last day of the next term, according to the old computation, after publication of the award, notwithstanding s. 23 of the Judicature Act, 1873.—*Governors of Christ's College v. Martin*, 36 L.T. 537; 25 W.R. 637.

Banker:—

- (viii.) **Ex. Div.**—*Misrepresentation*.—The public officer of a bank is not liable for misrepresentation by manager.—*Hosegood v. Bull*, 36 L.T. 617.

Bankruptcy:—

- (cv.) **C. A.**—*Abatement of Action*.—On bankruptcy or liquidation of a sole plaintiff he ceases to have any further interest in the action, but the action does not abate, and the trustee can obtain an order of course to carry it on.—*Jackson v. North-Eastern Rail. Co.*, 36 L.T. 779; 25 W.R. 518.
- (ovi.) **C. J. B.**—*Act of Bankruptcy—Intent to Defeat Creditors*.—Where in petition for adjudication the act of bankruptcy alleged was that debtor, being a trader, “absented himself,” but not that he did so “with intent to defeat or delay creditors”: *Held* that the omission was fatal and the adjudication must be annulled.—*Ex parte Skelton, Re Skelton*, 36 L.T. 806; 25 W.R. 800.
- (cvii.) **C. J. B.**—*Act of Bankruptcy—Preference—Banker's Lien*.—Bankers agreed to allow W. to overdraw his account on a guarantee by sureties to the amount of £1,800: W.'s overdraft exceeded £2,400, and being pressed to reduce the debt he handed to the manager cheques and bills to the amount of £2,460 and shortly afterwards filed liquidation petition: *Held* that banker's lien attached and that the payment was neither a fraudulent preference nor act of bankruptcy.—*Ex parte Carlisle Banking Company, Re Walton*, 36 L.T. 522.
- (cviii.) **C. A.**—*Appeal*.—An appellant in bankruptcy will not be allowed to raise on appeal a new case inconsistent with the case originally raised.—*Re Walton, Ex parte Reddish*, 25 W.R. 741.
- (cix.) **C. J. B.**—*Appeal—County Court Order—Jurisdiction*.—The Chief Judge has jurisdiction to hear appeal from a county court order made on request of Court of Bankruptcy.—*Re Vaughan & Co., Ex parte Jackson, Gill, & Co.*, 36 L.T. 711; 25 W.R. 561.
- (cx.) **C. A.**—*Appeal—Time*.—The fact that 21 days from date of an order in bankruptcy expire on a day when the Registrar's office is closed is not a reason for extending the time within which notice of appeal must be given.—*Ex parte Saffery, Re Lambert*, L.R. 5 Ch. 365; 36 L.T. 532; 25 W.R. 572.
- (cxi.) **C. A.**—*Bill of Exchange—Proof*.—M. lent money to K. on security of bills accepted by K., and of assignment of debts due to K. with notice to debtors: M. discounted the bills with his bankers, who, on K.'s liquidating, proved for the full amount thereof: the trustee collected the assigned debts: *Held* that M. was not entitled to the proceeds unless he took up the bills.—*Ex parte Mann, Re Kattengell*, L.R. 5 Ch. D. 367.
- (cxii.) **C. A.**—*Bill of Sale—Constructive Possession*.—Holder of unregistered bill of sale must take actual physical possession of the goods before default to entitle him to hold them.—*Re Henley, Ex parte Fletcher*, 36 L.T. 758; 25 W.R. 573.
- (cxiii.) **C. J. B.**—*Bill of Sale*.—Successive renewals of a bill of sale to defeat

the operation of the Bankruptcy Laws are utterly invalid.—*Re Fellow, Ex parte Furber*, 36 L.T. 668.

- (oxiv.) **C. A.**—*Bill of Sale*.—Traders assigned whole property to secure past debt and payment off of an execution by bill of sale empowering grantee to take immediate possession in default of payment on demand: grantee took possession within 20 days, and grantors filed liquidation petition: Held that bill of sale was void against the trustee.—*Ex parte Greener, Re Vane*, 36 L.T. 781.
- (cxv.) **C. A.**—*Composition—Debtor's Statement*.—Decision of C.P. Div., Bankruptcy (lxxxiv.), p. 85, reversed, and held that plaintiffs were not barred from suing on the award for the full amount.—*Melhado v. Watson*, L.R. 2 C.P.D. 281; 36 L.T. 724; 25 W.R. 562.
- (cxvi.) **C. A.**—*Composition—Default—Adjudication*.—Where default had been made in payment of a composition secured by the promissory notes of a liquidating debtor and sureties: Held that the Court had jurisdiction on a creditor's petition to adjudicate the bankrupt under s. 126 of the Bankruptcy Act, notwithstanding that no act of bankruptcy had been committed within the previous six months. Decision of C. J. B., reported 36 L.T. 561; 25 W.R. 633, affirmed.—*Ex parte Charlton, Re Charlton*, 25 W.R. 800.
- (cxvii.) **C. A.**—*Composition—Resolutions—Objection to Proof*.—Proof of a creditor who has voted at first meeting on a composition resolution may be objected to at the second meeting.—*Ex parte Weil, In re Mentthrop*, L.R. 5 Ch. 345; 36 L.T. 533; 25 W.R. 552.
- (cxviii.) **C. A.**—*Composition—Resolution—Registration—Proxy in Blank*.—Decision of C. J. B., Bankruptcy (lxxxiii.), p. 85, reversed.—*Ex parte Lancaster, Re Lancaster*, 36 L.T. 674; 25 W.R. 669.
- (cxix.) **C. A.**—*Debtor's Summons—Stay of Proceedings—Security*.—Where a creditor commenced an action and subsequently took out debtors summons in respect of the same debt without applying that defendant might give security for costs before defending the action, the registrar considered that the omission was a bar to plaintiffs obtaining security on defendant's application to stay proceedings on the summons: Held that the omission did not absolutely disentitle the plaintiff, but might well influence the registrar in his discretionary decision in respect of such security.—*Re Smith, Ex parte Hosford*, 25 W.R. 799.
- (cxx.) **C. A.**—*Debtor's Summons*.—Where an order was made for stay of proceedings under a debtor's summons upon debtor's giving security for the amount of the debt and costs, in order that an action might be brought to test the validity of the debt: Held that under the circumstances there were no sufficient reasons to justify the Court in interfering with the discretion of the Chief Judge in making the order.—*Ex parte Marshall, Re Marshall*, 25 W.R. 762.
- (cxxi.) **C. A.**—*Jurisdiction—Injunction—Gas—Distress*.—Held that the exercise by virtue of a Justice's warrant of the power of distress given to a gas company by their special Act for the purpose of enforcing payment of money due for supply of gas, in such Act called "rent," was a "legal process" restrainable by injunction.—*Re Hill, Ex parte Roberts*, 25 W.R. 784.
- (cxxii.) **C. A.**—*Liquidation—Examination*.—A trustee in liquidation, if not satisfied with information given by debtor, may summon him for examination without proving any default: decision of V. C. B., Bankruptcy (xxiii.), p. 6, reversed.—*Ex parte Close, Re Bennett & Glave*, L.R. 5 Ch. 145; 36 L.T. 429; 25 W.R. 504.
- (cxxiii.) **Ch. Div. V. C. B.**—*Liquidation—Order and Disposition*.—In action for specific performance of agreement to execute bill of sale, a receiver was appointed and took possession of the goods: next day the debtor

filed a liquidation petition: *Held* that the possession of the receiver took the goods out of the order and disposition of debtor.—*Taylor v. Eckersley*, 36 L.T. 442; 25 W.R. 527.

(cxxxiv.) **C. J. B.**—*Liquidation—Receiver*.—Where a receiver has been appointed by the Court, a nominee of majority of creditors will not be substituted for him unless special grounds are shown.—*Ex parte Rylands, Re Chester*, 36 L.T. 524; 25 W.R. 786.

(cxxxv.) **C. J. B.**—*Order and Disposition*.—A. purchased her father's furniture from his trustee in liquidation, but no assignment thereof was made to her: she continued to live with her father, whose name was on the door of the house, and who paid the rates and taxes: *Held* that on the father's bankruptcy the furniture passed to his trustee.—*Ex parte Moore, Re Cook*, 36 L.T. 560.

(cxxxvi.) **C. A.**—*Detinue—Proof*.—D. recovered judgment against W. in action for detinue of a mare for £60: W. became bankrupt before execution, and sheriff was restrained by injunction from levying: D. proved for the £60 and costs, but the trustee neither allowed nor rejected the proof: subsequently D. saw the mare in possession of W., and caused her to be removed by the sheriff: *Held* that property in the mare was not divested from D., and that he was entitled to the mare.—*Re Ware, Ex parte Drake*, 36 L.T. 677; 25 W.R. 641.

(cxxxvii.) **C. A.**—*Proof—Surety*.—Where surety holding security does not prove in principal's bankruptcy, unsecured creditors in respect of the same debt may prove for full amount thereof. Decision of C. J. B. reported *sub. nom.*, *Ex parte Braithwaite, Re Yewdall*, 36 L.T. 520; 25 W.R. 635, affirmed.—*Re Yewdall, Ex parte Barnfather*, 25 W.R. 742.

(cxxxviii.) **C. A.**—*Proof—Proxy—Liquidator*.—The liquidator of a company in his affidavit of proof against a bankrupt's estate for a debt due to the company described himself as such liquidator: at the foot of the affidavit was a proxy in this form, "I appoint T. and D. jointly and severally my proxy," which he merely signed with his own name: *Held* that the proxy was good.—*Ex parte Taylor, Re Pooley*, 36 L.T. 679; 25 W.R. 641.

(cxxxix.) **C. A.**—*Stoppage in Transit—Bill of Lading*.—Decision of Q.B. Div., Bankruptcy (ciii.), p. 87, reversed, and held that *bond fide* delivery of bill of lading for past valuable consideration destroys vendor's right to stop goods *in transitu*.—*Leask v. Scott*, L.R. 2 Q.B.D. 376; 36 L.T. 784; 25 W.R. 654.

Bill of Exchange:—

(vi.) **C. A.**—*Specific Appropriation—Lien—Equitable Assignment*.—Decision of V. C. H., Bill of Exchange (v.), p. 51, reversed.—*Ranken v. Alfaro*, 36 L.T. 529.

Bill of Sale:—

(ix.) **C. J. B.**—*Registration—Assignment*.—An assignment after the Bill of Sales Act, 1854, of a bill of sale executed before the Act does not require registration.—*Re Shaw, Ex parte Shaw*, 36 W.R. 805; 25 W.R. 686.

(x.) **Q. B. D.**—*Registration—Renewal*.—Where a bill of sale has not been renewed every five years, as required by 29 & 30 Vict. c. 96, s. 4, the assignee of the grantee's interest has no title against an execution creditor.—*Karet v. Kosher Meat Supply Association*, L.R. 2 Q.B.D. 361; 36 L.T. 694; 25 W.R. 691.

Charity:—

(ii.) **C. A.**—*Endowed School—Action for Recovery of Land—Consent of Charity Commissioners*.—Decision of M. R., Charity (i.), p. 88, affirmed.—*Holme v. Guy*, 36 L.T. 600; 25 W.R. 547.

Company:—

- (xli.) **P. C.**—*Directors—Ultra Vires.*—Where directors having powers to borrow and mortgage have exceeded their powers, the ratification by the company of the particular acts done in excess of authority does not extend the authority of the directors so as to enable them to do similar acts in future.—*Irvine v. Union Bank of Australia*, L.R. 2 App. 366; 25 W.R. 682.
- (xlii.) **C. A.**—*Forfeiture of Shares—Inaccuracy of Notice.*—When directors of a company regulated by table A of Companies' Act, 1862, seek to forfeit a shareholder's shares for non-payment of calls every one of the conditions precedent as to notice, &c., laid down by table A must have been strictly and literally observed.—*Johnson v. Lytton's Iron Agency*, 36 L.T. 528; 25 W.R. 548.
- (xliiii.) **C. A.**—*Misrepresentation—Liability.*—The owners of a concession from a foreign government, which they knew to be voidable and liable to forfeiture, agreed with certain persons to form a company to purchase the concession, which was accordingly sold to trustees for the company: the vendor's solicitor acted for the company, and did not disclose the infirmity of title, nor did the trustees require evidence as to title: *Held* that the owners and promoters must repay the purchase money, that the trustees must repay money received by them as bribes for neglect of their duty, and that owners, promoters, trustees, and solicitor must pay costs of the suit.—*Phosphate Sewage Co. v. Hartmont*, L.R. 5 Ch. 394.
- (xliv.) **Ch. Div. V. C. B.**—*Misrepresentation—Promoters—Prospectus.*—*Held* that the omission from prospectus of mention of agreement between vendors of ironworks and promoters of companies whereby promoters were to receive a sum out of the purchase money, was a fraud on shareholders, and that promoters were jointly and severally liable to make good to the company the moneys received by them.—*Bagnall v. Carlton*, 36 L.T. 653.
- (i.) **C. A.**—*Prospectus—Promoters—Non-disclosure of Contract*—30 & 31 Vict., c. 131.—Before issue of prospectus, contractors agreed to pay to G and S, who had a concession for making some tramways abroad, certain sums which they included in contract price for the works: *Held* affirming decision of C.P. Div., reported 25 W.R. 586, that this was a contract within Companies' Act, 1867, s. 38, and ought to have been disclosed in prospectus, and that plaintiff, an allottee of shares, was entitled to recover the whole amount paid by him for his shares.—*Twycross v. Grant*, 25 W.R. 701.
- (ii.) **C. A.**—*Novation—Amalgamation—Decision of Foreign Tribunal.*—Decision of V. C. M., Company (xxxvi.), p. 89, affirmed.—*Re St. Nazaire Co.*, 25 W.R. 638.
- (iii.) **Ch. Div. V. C. B.**—*Reduction of Capital.*—"Capital" in Companies' Act, 1867, s. 9. signifies nominal capital: where the capital of a company has been issued and fully paid up the court has no jurisdiction to confirm a resolution for reduction of such capital.—*Re Kirkstall Brewery Co.*, L.R. 2 Ch. D. 535; 46 L.J. Ch. 424.
- (liii.) **C. A.**—*Register—Rectification.*—P., through broker, sold shares in a company to S., who paid price to broker: the transfer deed was executed by P. and S. but cancelled by broker, who appropriated the money: *Held* that the court had jurisdiction under Companies' Act, 1862, s. 35, to rectify register by inserting name of S instead of P.—*Re Shaw*, 46 L.J.Ch. 395; 36 L.T. 573; 25 W.R. 569.
- (liv.) **Ch. Div. M. R.**—*Rights of Shareholders—Back Dividends.*—A resolution provided for issue of new shares with preferential dividend of 5 per cent., and that whenever the profits admitted of a "dividend of the

same amount" being paid to ordinary shareholders any surplus should be divided amongst all the shareholders: after some years the profits increased so as to be more than sufficient to pay £5 per cent. on all shares: *Held* that the ordinary shareholders were entitled to payment of back dividends before there was any surplus for distribution.—*Allen v. Londonderry and Enniskillen Rail. Co.*, 25 W.R. 524.

- (lv.) **Ch. Div. V. C. M.**—*Winding Up—Contributory*.—When articles of association provided that shareholders should contribute in proportion to their shares, and it turned out that some of the shareholders were unable to pay: *Held* that the solvent shareholders were liable for the whole amount.—*McKewan's case*, 36 L.T. 609; 25 W.R. 577.
- (lvi.) **Ch. Div. V. C. M.**—*Winding-up—Contributories*.—On formation of a company nine persons signed the memorandum of association, at a preliminary meeting it was resolved that no shares be allotted to three of the signatories, and, with their consent, their deposits were returned: the articles contained no power to accept surrender of shares: *Held* that all the signatories were liable as contributories.—*Re London & Provincial Consolidated Coal Co.*, L.R. 5 Ch. D. 525; 36 L.T. 545.
- (lvii.) **Ch. Div. V. C. M.**—*Winding-up—Contributory*.—Where there was a merely nominal payment for shares allotted to B., who was settled on list of contributories: *Held* that B. was liable to pay calls.—*Re Eupion Gas Co.*, *Aspinall's Case*, 36 L.T. 362.
- (lviii.) **Ch. Div. V. C. B.**—*Winding-up—Contributory—Director*.—O. was given his qualification shares by a promoter of a colliery company, but did not become a director till after formation of the company and completion of purchases of the colliery: *Held* that he was liable as contributory in respect of shares received.—*Re Caerphilly Colliery Co.*, *Ormerod's Case*, 25 W.R. 765.
- (lix.) **Ch. Div. M. R.**—*Winding-up—Contributory—Director*.—Articles of company provided that directors' qualification should be 50 shares held for six months previous: H. was elected director not holding any shares: he attended meetings, but resigned before any shares were allotted: *Held* that his election was void, and that he could not be taken to have contracted to take shares.—*Re Percy and Kelly Nickel Co.*, *Hamley's Case* 25 W.R. 600.
- (lx.) **C. A.**—*Winding-up—Contributory—Original Director*.—Decision of M.R., *Company (xxvii.)*, p. 53, affirmed.—*Miller's Case*, *Re Australian Direct Steam Navig. Co.*, L.R. 5 Ch. D. 70.
- (lxi.) **C. A.**—*Winding-up—Demurrable Petition*.—If a winding-up petition is demurrable the Court has no jurisdiction to direct a meeting of contributories to be summoned.—*Re Langham Skating Rink Co.*, 46 L.J. Ch. 345; 36 L.T. 605.
- (lxii.) **C. A.**—*Winding-up—Director—Contributory*.—A director on formation of the company declared his intention of taking 450 shares besides his qualification, and was elected chairman: he subsequently signed application for 450 shares striking out deposit clause: he never paid a deposit, nor were shares allotted: *Held*, reversing decision of V.C.M., that he was not liable as a contributory in respect of the 450 shares.—*Re Universal Non-Tariff Fire Insurance Co.*, *Ritso's Case*, L.R. 4 Ch. D. 774.
- (lxiii.) **C. A.**—*Winding-up—Director's Qualification—Contributory*.—Decision of V.C.B., *Company (xxxix.)*, p. 89, affirmed.—*Re Caerphilly Colliery Co.*, *Pearson's Case*, L.R. 5 Ch. D. 336; 46 L.J. Ch. 339; 25 W.R. 618.
- (lxiv.) **C. A.**—*Winding-up—Failure of Object*.—Petition to wind-up abortive company which had never carried on business, nor issued shares, and had no debts, presented by administrator of a subscriber of memoran-

dum of association was dismissed with costs: Decision of V.C.B. (reported L.R. 4 Ch. D. 874; 36 L.T. 364) affirmed.—*Re New Gas Co.*, 25 W.R. 643.

- (lrv.) Ch. Div. V.C.B.—*Winding-up—Lease—Liabilities*—88 & 89 Vict., c. 77 s. 10.—*Held* that a mortgagee of lessor of company in liquidation was not entitled to have assets impounded to meet future rent or to prove for the amount, no breach of covenant having as yet taken place.—*Re Westbourne Grove Drapery Co.*, L.R. 5 Ch. 248; 36 L.T. 439; 25 W.R. 509.
- (lvi.) Ch. Div. V. C. M.—*Winding-up—Proof—Surety—Interest*.—*Held*, on the construction of the articles of a company, that certain persons who, as sureties, had paid large sums for interest on a debt of the company were not entitled, on the winding-up of the company, to be allowed interest on such payments.—*M'Kewan's Case, Re Maria Anna Steinbank Co.*, 36 L.T. 613; 25 W.R. 579.
- (lvii.) Ch. Div. M. R.—*Winding-up—Supervision Order*.—An order to continue a voluntary winding-up under supervision of Court can only be made on petition of company, creditor, or contributory.—*Re Pen y Van Colliery Co.*, 46 L.J. Ch. 390.
- (lviii.) Ch. Div. V. C. B.—*Winding-up—Set-off*.—On winding-up company A., some of the assets were in the hands of company B., which afterwards, with notice of winding-up, applied them to payment in full of debts of A.: *Held* that B. could not set-off those payments in accounting to liquidator for the assets.—*Re United Ports General Insurance Co.*, 46 L.J. Ch. 403; 36 L.T. 457; 25 W.R. 580.
- (lix.) Ch. Div. V. C. B.—*Winding-up—Unregistered Association*.—Where more than seven persons admitted themselves to be members of an unregistered association: *Held* that a winding-up order must be made without prejudice to the question as to what other persons were members and ought to be put on the list of contributories.—*Re South of France Pottery Works Syndicate*, 36 L.T. 651.
- (lxx.) C. A.—*Winding-up Petition—Practice*.—A person who has paid off a creditor who has presented a winding-up petition, cannot upon such petition obtain a winding-up order.—*Re Paris Skating Rink Co.*, 25 W.R. 701.
- (lxxi.) Ch. Div. V. C. H.—*Winding-up Petition—Practice—Mandamus*.—While the above petition was pending, notice of motion was given to directors for mandamus directing them to hold an ordinary meeting: the petition having been dismissed, as above, by C. A.: *Held* that there was no matter pending in which a mandamus could issue.—*Re Paris Skating Rink Co.*, 25 W.R. 707.
- (lxxii.) Ch. Div. M. R.—*Winding-up Voluntarily—Sale of Assets*.—A company resolving on a voluntary winding-up and sale of assets in consideration of shares in another company, is not by Companies Act, 1862, s. 161, empowered to decide as to mode of distribution of such shares amongst classes of its members having different rights *inter se*, otherwise than according to such rights.—*Griffith v. Paget*, 46 L.J. Ch. 493; 25 W.R. 523.
- (lxxiii.) Ch. Div. M. R.—*Vote*.—*Held* that the chairman of a meeting of a company was not entitled to refuse to receive votes of registered shareholders, on the ground that such shareholders were nominees of the beneficial owners of the shares which had been distributed for the sole purpose of increasing voting power.—*Pender v. Lushington*, 46 L.J. Ch. 317.

Copyhold:—

- (v.) Ch. Div. F. J.—*Encroachment—Rights of Lord—Minerals*.—In case of encroachment by copyholder a legal origin will if possible be presumed,

the tenant will be estopped from denying that the encroachment belonged to the original holding, and the encroacher's acts will be construed so as to confer on him the least possible benefit: the lord of a copyhold manor is entitled to coprolites and may restrain their removal as being a permanent injury to the reversion.—*Attorney-General v. Tomline*, 36 L.T. 684; 25 W.R. 803.

Copyright :—

- (vi.) **Ch. Div. V. C. B.**—*Dramatic Copyright—Registration*—7 Vict., c. 12.—Where the registration of an opera under the International Copyright Act, s. 6, was incorrect as regards the time of first publication: *Held* that the registration was insufficient to protect the score and right of representation.—*Boosey v. Fairlie*, 25 W.R. 745.
- (vii.) **Q. B. Div.**—*Registration*—5 & 6 Vict. c. 45 s. 24.—Registration is not essential to existence of copyright, but merely to perfect the right to sue.—*Goubaud v. Wallace*, 36 L.T. 704; 25 W.R. 604.

County Court :—

- (xiii.) **C. A.**—*Appeal*.—An appeal will lie under Judicature Act, 1873, s. 19, from refusal of App. Div. Ct. to order County Court Judge to sign case.—*Clarke v. Roche*, 36 L.T. 727.

Crimes and Offences :—

- (xxvi.) **Q. B. Div.**—*Adulteration—Custom of Trade*.—To an information for selling adulterated gin appellant set up defence that by custom of the trade in the district that gin sold at a particular price should contain admixture of water: *Held* that conviction was right.—*Webb v. Knight*, 36 L.T. 791.
- (xxvii.) **Q. B. Div.**—*Certiorari*—19 & 20 Vict. c. 16.—The certificate mentioned in Palmer's Act, s. 25, may be in form supplied by Treasury, as set out in the report of this case.—*Regina v. Balscombe*, 25 W.R. 585.
- (xxviii.) **Ex. Div.**—*Cruelty to Animals*.—Cutting cocks' combs for the purpose of cockfighting or winning prizes at exhibitions is cruelty to animals within 12 & 13 Vict., c. 92, s. 2.—*Murphy v. Manning*, L.R. 2 Ex. Div. 307; 46 L.J.M.C. 211; 36 L.T. 592; 25 W.R. 540.
- (xxix.) **C. C. R.**—*False Pretences—Ambiguous Words*.—*Held* that ambiguous words in a certain letter might reasonably and naturally have conveyed to the mind of the prosecutor the false pretences alleged in the indictment, and that prisoner was rightly convicted.—*Regina v. Cooper*, 46 L.J. M.C. 219; 36 L.T. 671; 25 W.R. 696.
- (xxx.) **Q. B. Div.**—*False Pretences—Spiritualism*.—*Held* that a representation by defendant that he had power to communicate with spirits, and to cause them to be present in a materialised form, was a false pretence of an existing fact within 24 and 25 Vict., c. 96, s. 88, and that he was rightly convicted.—*Regina v. Lawrence*, 36 L.T. 404.
- (xxxi.) **C. C. R.**—*False Pretences*.—Prisoner, on entering service of a railway company, signed a contract whereby it was provided that he should not be entitled to claim wages due on leaving until he should have delivered up his uniform clothing: on leaving he knowingly and fraudulently delivered up a great coat belonging to a fellow-servant, and obtained the wages due to him: *Held* that he was rightly convicted of false pretences.—*Regina v. Bull*, 36 L.T. 376.
- (xxxii.) **C. C. R.**—*Larceny—Proof of Ownership*.—Prisoner was indicted for stealing brass, the property of H.; the brass was proved to have been the property of a limited company in voluntary liquidation: the resolutions for winding-up and appointment of H. and S. as liquidators was proved by copy of *Gazette*: *Held* that there was no evidence for jury that the brass was property of H.—*Regina v. Ball and Jordan*, 36 L.T. 670.

- (xxxiii.) **C. C. R.**—*Murder—Manslaughter—Accessories.*—Several persons were tried on one indictment, some for murder, others as accessories to murder, the principals were convicted of manslaughter: *Held* that those charged as accessories to murder might be convicted as accessories to manslaughter.—*Regina v. Richards*, L.R. 2 Q.B.D. 311; 46 L.J. M.C. 200; 36 L.T. 377.
- (xxxiv.) **C. C. R.**—*Music License—Skating Rink.*—A rink within 20 miles of London, where the skating is accompanied by music, requires a music and dancing license under 25 Geo. 2, c. 36.—*Regina v. Tucker*, L.R. 2 Q.B. 417; 46 L.J. M.C. 197; 36 L.T. 478; 25 W.R. 697.
- (xxxv.) **C. C. R.**—*Perjury—Evidence.*—The institution of the suit in which perjury was committed is sufficiently proved by production by officer of the Court of copy writ filed under Ord. 5, r. 7, and copy pleadings filed under Ord. 41, r. 1.—*Regina v. Scott*, L.R. 2 Q.B.D. 415; 36 L.T. 476; 25 W.R. 697.
- (xxxvi.) **Q. B. Div.**—*Rogue and Vagabond—"Palmistry or otherwise."*—5 Geo. 4, c. 83, s. 4.—*Mandamus to hear Appeal.*—S. was convicted as a rogue and vagabond by a magistrate: the quarter sessions quashed the conviction without going into the merits of the case because the words "by palmistry or otherwise" were omitted from the conviction: *Held* that a mandamus could not be granted to compel the sessions to hear the appeal.—*Regina v. Justices of Middlesex*, 36 L.T. 402; 25 W.R. 510.
- (xxxvii.) **C. P. Div.**—*Trespass—Game.*—A permission to take game may be given by laudlord verbally and will justify fresh pursuit of game on an adjoining field within 1 & 2 Wm. 4, c. 32, s. 30.—*Jones v. Williams*, 36 L.T. 569.

Debtor and Creditor:—

- (x.) **Q. B. Div.**—*Execution—Payment without Seizure—Poundage.*—When a debtor paid off the sheriff's officer on his premises without seizure: *Held* that the writ had been executed and that the sheriff was entitled to poundage and fees.—*Bissicks v. Bath Colliery Co.*, 36 L.T. 800.
- (xi.) **Ex. Div.**—*Insurable Interest*—14 Geo. 3, c. 48.—A. and B. entered into a joint bond for £300: A. effected a policy on B.'s life: *Held* that the policy was valid as to extent of half of the sum secured by the bond.—*Branford v. Saunders*, 25 W.R. 650.

Defamation:—

- (viii.) **Ex. Div.**—*Libel—"Felon"*—9 Geo. 4, c. 32.—It is actionable to call a man a felon who has been convicted of felony but served out his sentence.—*Leyman v. Latimer*, 25 W.R. 751.
- (ix.) **Q. B. Div.**—*Privilege—Bona Fides.*—Privilege in the case of defamatory communications made honestly does not extend to cases where they are made negligently and recklessly.—*Clark v. Molyneux*, 36 L.T. 466.

Easement:—

- (vi.) **Ch. Div. V. C. M.**—*Light.*—Owner of two adjoining houses demised one in which was a certain window to A., and afterwards demised the other to B.: *Held* that until the expiration of A.'s lease B. could not build so as to obstruct it.—*Warner v. McBryde*, 36 L.T. 361.
- (vii.) **C. A.**—*Light and Air.*—Decision of V. C. M., see Easement (iv.), p. 92, reversed, as regards five of the windows.—*Bourke v. Alexandra Hotel Co.*, 25 W.R. 782.

Ecclesiastical Law:—

- (x.) **C. P. Div.**—*Dilapidations*—34 & 35 Vict., c. 43 s. 29.—The requirement as to time within which bishop is to direct surveyor to inspect and

report on dilapidations is directory, and that delay does not deprive incoming incumbent of his right of action.—*Caldow v. Pizell*, 36 L.T. 469; 25 W.R. 773.

(xi.) **C. A.**—*Exchange of Livings—Deed of Resignation.*—Decision of C.P. Div. (Ecc. Law, ix., p. 93) affirmed.—*Rumsey v. Nicholl*, L.R. 2 C.P.D. 294; 36 L.T. 786; 25 W.R. 614.

(xii.) **Ar.**—*Inhibition—Contempt—Release—Costs.*—A vicar having been inhibited for disobedience to monition to discontinue certain ceremonies, still continued such ceremonies: he was then pronounced contumacious, and his contempt having been signified to the Queen in Chancery he was arrested and imprisoned under a writ *de contumace capiendo*: the services were then performed by a curate appointed by the bishop, and the complainants applied for respondent's release: the Court granted the application without previous payment by respondent of costs of the contempt, such costs to be recoverable as costs in the cause.—*Hudson v. Tooth*, L.R. 2 P.D. 125.

Election:—

(xi.) **C. P. Div.**—*Municipal Election—Nomination Paper.*—The seconder of a candidate described his place of residence as in "High Street," in the burgess-roll he was described as of W. Street: the name of the street had been and was generally known as High Street, but had recently been changed to W. Street: *Held* that the description was sufficient.—*Soper v. Mayor of Basingstoke*, 46 L.J. C.P. 422; 25 W.R. 693.

Evidence:—

(vii.) **Ex. Div.**—*Admissibility—Foreshore.*—Evidence of acts of ownership on parts of foreshore separated from the parts in dispute by foreshore belonging to Crown was admitted to prove defendant's title to the foreshore generally.—*Atty.-Gen. v. Mayor of Portsmouth*, 25 W.R. 559.

(viii.) **C. A.**—*Breach of Promise of Marriage.*—Plaintiff's sister gave evidence of interview with defendant, at which she upbraided him with having seduced plaintiff, when he said "he would marry her but I must not expose him," also of overhearing a conversation in which plaintiff said to defendant "you promised to marry me," when defendant said he would give her money to go away: *Held* that the evidence was admissible as "material" within 32 & 33 Vict., c. 68, s. 2.—*Bessela v. Stern*, L.R. 2 C.P.D. 265; 46 L.J. Ch. 467; 25 W.R. 561.

(ix.) **C. A.**—*Descent—Heir-at-Law.*—Decision of Ex. Div. (Evidence i., p. 13) affirmed.—*Greaves v. Greenwood*, 25 W.R. 639.

Forest of Dean:—

(iii.) **C. A.**—*Free Miners—Gale.*—Where a free miner dies after application for but before grant of gale the gale cannot be granted to his devisees not being free miners.—*James v. The Queen*, L.R. 5 Ch. Div. 153; 25 W.R. 615.

Fraud:—

(ii.) **C. P. Div.**—*Builder—Architect—Withholding Certificate.*—An action will lie by builder against architect who fraudulently, and in collusion with builder's employer, withholds certificate.—*Ludbrook v. Barrett*, 36 L.T. 616; 25 W.R. 649.

Highway:—

(viii.) **Q. B. D.**—*Repair—Extra-Parochial Place.*—Extra-parochial places are subjected by 25 and 26 Vict., c. 61, s. 32, to liability, not to common law indictment for non-repair of highways, but to be put into a highway district as highway parishes.—*The Queen v. Central Wingland*, L.R. 2 Q.B.D. 349; 36 L.T. 798.

- (ix.) **Q. B. Div.**—*Rate—Distress Warrant.*—By 7 and 8 Geo. 4, c. cviii., the owners of S. Abbey were empowered to levy rates for repair of roads: by 39 and 40 Vict., c. ccxx., it was provided that they should pay a sum to a local board for future repairs, whereupon their liability should cease and the former act be repealed: a month before the passing of the latter act the owners levied a rate to cover past liabilities, and also to provide the payment to the local board: the demand referred to both acts, but not to the purposes of the later act: *Held* that justices could not entertain objection to validity of rate or refuse distress warrant.—*Regina v. Justices of Essex*, 36 L.T. 554.

Husband and Wife:—

- (xvi.) **P. D. A. Div.**—*Divorce—Collusion.*—An agreement between the parties to withhold any relevant evidence constitutes collusion.—*Bacon v. Bacon*, 25 W.R. 560.
- (xvii.) **P. D. A. Div.**—*Divorce.*—An application to dispense with making a co-respondent was granted after respondent had filed her answer.—*Jeffers v. Jeffers*, L.R. 2 P.D. 90; 25 W.R. 513.
- (xviii.) **C. A.**—*Divorce—Wife's Separate Property—Husband's Creditors.*—A wife living apart from her husband by agreement under sanction of the court purchased goods out of moneys partly belonging to her separate estate partly allowed to her by her husband: a decree nisi for dissolution of marriage having been made she bought other goods: subsequently, but before the decree was made absolute, a creditor of the husband seized all the goods: *Held*, reversing decision of Ex. Div., reported 36 L.T. 663; 25 W.R. 558, that the wife could not maintain action for trespass in respect of all the goods.—*Norman v. Villars*, 36 L.T. 788; 25 W.R. 780.
- (xix.) **P. D. A. Div.**—*Nullity Suit—Consanguinity—Lex loci contractus.*—Two Portuguese persons contracted in London marriage illegal by law of Portugal on ground of consanguinity, and returned to Portugal and continued to reside there: a petition for nullity of marriage for illegality was dismissed.—*Sottomayor v. De Barros*, L.R. 2 P.D. 81; 26 L.T. 746; 25 W.R. 541.
- (xx.) **Ch. Div. V. C. H.**—*Separate Estate.*—G. received in payment of a legacy to her separate use a country draft on London bankers: she indorsed to her husband, who paid it in to his own deposit account, and shortly afterwards died: she deposed that she never intended to give the cheque to her husband: *Held* that she was entitled to the sum claimed.—*Green v. Cartill*, L.R. 4 Ch. D. 882; 46 L.J. Ch. 477.
- (xxi.) **Ch. Div. V. C. M.**—*Separate Estate—Married Women's Property Act, 1870.*—Where husband permits wife to carry on trade on her own account, the business, stock, and profits become her separate property as against him and his representatives.—*Ashworth v. Outram*, 36 L.T. 400.
- (xxii.) **Q. B. Div.**—*Separate Estate—Promissory Note—Liability.*—Married woman having separate property, without power of anticipation, gave a promissory note jointly with her husband and a third person; her husband having died, *Held* that she was not liable.—*Roberts v. Watkins*, 39 L.T. 799.
- (xxiii.) **Ch. Div. V. C. M.**—*Wife's Chose in Action—Reduction into Possession.*—A. sold his wife's share in an intestate's estate to B., a solicitor who conducted a suit for administration thereof: the executors of A., who predeceased his wife, instituted a suit to set aside the sale on ground of concealment by B. of true value of the share: *Held* that the wife's chose in action had been reduced into possession by A., and that the right to avoid the sale survived to his executors.—*Widgery v. Tepper*, L.R. 5 Ch. 516; 25 W.R. 726.

Insurance:—

- (xviii.) **C. A.**—*Fire Insurance—Wharfinger's Liability.*—Decision of **M. R. Insurance** (iv.), p. 15, affirmed.—*North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.*, 36 L.T. 629.
- (xix.) **Q. B. Div.**—*Marine Insurance—Partial Loss—Repairs.*—The liability of an underwriter, on a ship which has been repaired by the assured, is to be measured by the cost of the repairs, not by the depreciation of the value of the ship, even though the underwriter is thereby made liable for more than a total loss, with benefit of salvage.—*Lohre v. Atchison*, 36 L.T. 795.
- (xx.) **C. A.**—*Marine Insurance—Warranty of Seaworthiness.*—Where vessel built for inland navigation is insured for ocean voyage, there is implied warranty that all ordinary means possible shall be taken to render her seaworthy.—*Turnbull v. Janson*, 36 L.T. 633.

Jurisdiction:—

- (iii.) **Ex. Div.**—*Prohibition—Salford Court of Record.*—Held that the Salford Hundred Court of Record Act, 1868, providing that defendant should not object to the jurisdiction otherwise than by special plea, did not prevent the Superior Courts from granting a prohibition on the application of defendant.—*Oram v. Brearey*, L.R. 2 C.P.D. 346; 46 L.J. Ex. 481; 36 L.T. 475; 25 W.R. 695.

Landlord and Tenant:—

- (xii.) **C. A.**—*Agreement for Lease—Statute of Frauds.*—Decision of **Ex. Div.**, Landlord and Tenant (xix.), p. 96, reversed.—*Hand v. Hall*, 36 L.T. 765; 25 W.R. 734.
- (xxii.) **Ch. Div. V. C. M.**—*Agreement for Lease—Statute of Frauds.*—Held that agreement for lease for 12 years, not stating commencement of term, did not satisfy requirements of Statute of Frauds.—*Cartwright v. Miller*, 36 L.T. 398.
- (xxiii.) **C. A.**—*Building Covenant.*—Leases of adjoining plots of land subject to covenants against building so as to annoy co-tenants or without lessor's approval were granted to A. and B.: within 20 years A. built with lessor's approval so as to obstruct B.'s lights: Held that B. was not entitled to restrain A. from building or the lessor from approving.—*Master v. Hansard*, L.R. 4 Ch. D. 718; 36 L.T. 535; 25 W.R. 570.
- (xxiv.) **H. L.**—*Covenant—Repair—Forfeiture.*—Decision of **C. A.**, Landlord and Tenant (iv.), p. 17, affirmed.—*Hughes v. Metropolitan Rail. Co.*, 25 W.R. 680.
- (xxv.) **C. P. Div.**—*Covenant to Repair—Holding Over.*—Tenant for life of long leaseholds demised the same from year to year to A. with six months' notice to quit, and subject to lessee's covenant to repair: on death of tenant for life the lease was assigned to B., to whom A. continued to pay rent, and ultimately gave six months' notice to quit: Held that A. held over on terms of original agreement, and was bound by covenant to repair.—*Wyatt v. Cole*, 36 L.T. 613.
- (xxvi.) **Ch. Div. V. C. B.**—*Covenant—Private Residence.*—Land subject to a restrictive covenant that buildings erected thereon should be used as a private residence, and not for any purpose of trade, was purchased by the trustees of a charitable institution who proceeded to erect thereon a residence for a hundred girls: Held that the covenant did not apply.—*German v. Chapman*, 25 W.R. 802.
- (xxvii.) **Ch. Div. F. J.**—*Covenant—Trade.*—B. demised an eating-house to F. for 21 years, covenanting not to let during the term any house in the same street "for the purpose of carrying on the business of an eating-house" provided that the covenant should only bind B., not his heirs, adminis-

trators, or assigns: subsequently B. let adjoining house, subject to covenant by lessee, not to carry on business without B.'s license: *Held* that B.'s covenant with A. was not broken by the carrying on at the adjoining house by assignee of the lease thereof of the business of an eating-house without interference by B.—*Kemp v. Bird*, L.R. 5 Ch. D. 549.

- (xxviii.) **Ex. Div.**—*Furnished House—Fitness for Occupation.*—In agreement for lease of furnished house there is implied condition of fitness for occupation, non-fulfilment whereof entitles lessee to rescind contract.—*Wilson v. Finch-Hatton*, L.R. 2 C.P.D. 336; 36 L.T. 473; 25 W.R. 537.
- (xxix.) **C. J. B.**—*Public House—Bankruptcy of Lessee—License.*—Lease of a public house determinable on lessee's bankruptcy contained covenant by lessee to assign his license to lessor on such determination: *Held* that on lessee's bankruptcy the license was not "property" of the debtor which passed to the trustee, but that the license, not being assignable, must be delivered to lessor.—*Re Britnor, Ex parte Royle*, 25 W.R. 560.

Lands Clauses Act:—

- (xvi.) **Q. B. Div.**—*Arbitration—Costs*—6 & 7 Vict., c. 73, 538.—When claims for compensation were submitted to arbitration, but before award the parties agreed that defendants should have immediate possession of the land upon terms as to payment of interest and of all costs of arbitration, agreement, and conveyance: *Held* that the costs must be taxed in Chancery.—*Wombwell v. Corporation of Barnsley*, 36 L.T. 708.
- (xvii.) **C. A.**—*Compensation—Ferry.*—Where a railway company under their Act built a bridge across a river near an ancient ferry, whereby the profits of the ferry fell off: *Held* that the owner of the ferry could not maintain action for disturbance, nor claim compensation in respect of the ferry being injuriously affected under the Lands Clauses Act or Railways Clauses Act.—*Hopkins v. Great Northern Rail. Co.*, L.R. 2 Q.B.D. 224; 46 L.J. Q.B. 265.
- (xviii.) **C. A.**—*Compensation—Interest in Land—Water-pipes.*—Defendants took under their Act land under which were laid pipes belonging to plaintiffs: the pipes ceased to be used, but remained till taken up by defendants in making a tunnel: *Held* that plaintiffs had no interest in the land so as to claim compensation under s. 68.—*New River Co. v. Midland Rail. Co.*, 36 L.T. 539; 25 W.R. 502.
- (xix.) **Ch. Div. V. C. B.**—*Compulsory Powers—Possessory Title.*—A railway company took compulsorily land of A., who had only a possessory title of nineteen years, and paid purchase-money into the bank, and executed deed poll under Lands Clauses Act, 3, 77; the owner of the land made no claim till after 20 years from commencement of A.'s possession: *Held* that the money must be paid to representatives of A. since deceased.—*Re Winder*, 25 W.R. 768.
- (xx.) **Ch. Div. M. R.**—*Fund in Court—Investment—Conversion.*—Purchase money of infant's land was paid into Court and invested under s. 69: *Held* that on death of infant it passed to his heir-at-law.—*Kelland v. Fulford*, 25 W.R. 506.
- (xxi.) **Ch. Div. V. C. B.**—*Payment out—Presumption.*—The Court acted on the presumption that a married woman, aged 52 years, who had been married 15 years without having had children, would not have any in future.—*Re Allason's trusts*, 36 L.T. 653.
- (xxii.) **Q. B. Div.**—*Superfluous Lands.*—Lands taken compulsorily, which at expiration of the time for sale of superfluous lands are not in actual use for the purposes of the undertaking, but are *bona fide* intended ultimately to be used for those purposes, are not superfluous lands within s. 127.—*Hooper v. Bourne*, L.R. 2 Q.B.D. 339; 25 W.R. 672.

Leases and Sales of Settled Estates Acts:—

- (v.) **Ch. Div.**—*Infant Beneficiaries—Service of Petition.*—Realty was settled by will or trust for J. for life, remainder for her children, and in default of children for S. and E., but if either should die without leaving issue who should attain 21, for the survivor absolutely: J., S., and E., had a power of appointment and of sale: E.'s interest was settled on her marriage: J. was living unmarried: *Held* that infant children of E. were necessary parties to petition by trustees and J. under Settled Estates Act, 1856, and that the petition must be served on their father.—*Re Dendy*, L.R. 4 Ch. D. 879; 46 L.J. Ch. 417.
- (vi.) **C. A.**—*Mining Lease—Contiguous Settled Estates.*—A will devised two separate estates on distinct trusts: the trustees obtained from the Court power to grant mining leases, with consent of respective tenants for life: afterwards the trustees and tenants for life agreed to lease the minerals under both estates at one rent: *Held* that specific performance must be refused.—*Tolson v. Sheard*, L.R. 5 Ch. D. 19; 36 L.T. 756; 25 W.R. 667.

Licensed House:—

- (v.) **Q. B. Div.**—*Drunkenness.*—A licensed person found drunk on his own licensed premises after the premises are closed is not liable to penalty under 35 and 36 Vict., c. 94, s. 12.—*Lester v. Torrrens*, L.R. 2 Q.B.D. 403; 25 W.R. 691.
- (vi.) **Q. B. Div.**—*Grocer—Prohibited Hours.*—A grocer licensed to sell liquor off the premises cannot be convicted under 37 and 38 Vict., c. 49, ss. 3, 9, for keeping his shop open after prohibited hours without proof of sale or exposure for sale of liquors.—*Tassell v. Ovenden*, L.R. 2 Q.B.D. 383; 36 L.T. 696; 25 W.R. 692.

Market:—

- (ii.) **Q. B. Div.**—*Cattle Market—Slaughter House.*—A company under the provisions of a local act, with the consent of corporation, built a cattle market and slaughter houses: they subsequently abandoned the slaughter houses, and without further consent of corporation built other slaughter houses at some distance: *Held* that respondent could not be convicted under s. 19 of Markets and Fairs Clauses Act, 1847, for slaughtering cattle elsewhere within the borough.—*Hughes v. Trew*, 36 L.T. 585.

Master and Servant:—

- (viii.) **Ex. Div.**—*Negligence—Common Employment.*—The signal service at a joint siding was managed at the joint expense of the defendants and the G. N. Rail. Co., but the joint staff servants were engaged and paid by the latter company alone: one of these servants was killed by the negligence of one of defendants' engine-drivers: *Held* that there was common employment so as to free defendants from liability.—*Swainson v. N. E. Rail. Co.*, 25 W.R. 676.

Metropolitan Management:—

- (viii.) **C. A.**—*Addition to Buildings—18 & 19 Vict., c. 122.*—Decision of App. Div. Ct., Metropolitan Management (i.), p. 61, reversed.—*Scott v. Legg*, 36 L.T. 456; 25 W.R. 594.
- (ix.) **C. P. Div.**—*Scavenger—Removal of "Refuse."*—*Held*, upon construction of Metropolitan Local Management Act, 1855, s. 128, that coal-ashes from steam-engine employed as motive power in a factory is "refuse of a manufacture," and liable to extra payment for removal.—*Gay v. Cadby*, 36 L.T. 410.
- (x.) **Q. B. D.**—*Vestry Clerk—Valuation List.*—*Held* that the vestry clerk of a metropolitan parish was entitled to a special payment for preparing a valuation list required by the Valuation Metropolitan Act, 1869.—*The*

Queen v. Cumberlege, L.R. 2 Q.B.D. 866; 46 L.J.M.C. 214; 36 L.T. 700; 25 W.R. 606.

Mines:—

- (v.) **C. P. Div.**—*Special Rules*—35 & 36 Vict., c. 76.—By the special rules of a mine made under the Mines Regulation Act, 1872, “persons employed” on the works were forbidden to go up or down the mine contrary to the directions of the hooker-on: certain workmen having discharged themselves while in the mine insisted on being drawn up out of the pit contrary to the directions of the hooker-on: *Held* that they were still subject to the rule, and were guilty of a breach thereof.—*Higham v. Wright*, 46 L.J.M.C. 223.

Mortgage:—

- (xiii.) **C. A.**—*Construction of Deed—Redemption*.—Bonds of a public loan were issued by railway contractors at 27 per cent. interest, and redeemable by drawings: *Held* that bonds drawn but not redeemed could only be redeemed by payment of principal together with interest from time of drawing until payment: Decision of M.R., *Mortgage* (vi.), p. 61, varied.—*Gordillo v. Weguelin*, L.R. 5 Ch. D. 287; 36 L.T. 206; 25 W.R. 620.
- (xiv.) **Q. B. Div.**—*Fixtures—Machinery*.—*Held* that a portable engine and boiler which was bolted to a wooden framework embedded in mortar laid upon a brick foundation was affixed so as to pass by a mortgage of a freehold.—*Gross v. Barnes*, 46 L.J. Q.B. 479; 36 L.T. 693.
- (xv.) **C. A.**—*Priority—Purchase of Equity of Redemption—Keeping Charge Alive for Benefit of Purchaser*.—Decision of V.C.H., *Mortgage* (x.), p. 62, affirmed.—*Adams v. Angell*, 46 L.J. Ch. 352; 36 L.T. 334.

Municipal Law:—

- (xiii.) **C. A.**—*County Rate—Addition to Borough*—2 & 3 Wm. IV., c. 64; 5 & 6 Wm. IV., c. 76.—The borough of New Windsor up to 1832, consisted of the parish of New Windsor and part of the parish of Clewer, and was not subject to county rate; subsequently other part of Clewer which had been subject to county rate was added to the borough: *Held* that the borough was liable to contribute to the county rate in respect of the added district. Decision of Q. B. Div. affirmed.—*Reg. v. Justices of Berks*. 36 L.T. 720.
- (xiv.) **C. A.**—*Nuisance—Injunction—Notice of Action*.—Decision of V.C.M., *Municipal Law* (xi.), p. 98, reversed.—*Flower v. Layton Local Board*, L.R. 5 Ch. D. 347; 36 L.T. 760; 25 W.R. 545.
- (xv.) **Ex. Div.**—*Street*—21 & 22 Vict., c. 98.—*Held* that under Local Government Act, 1858, s. 32, the urban sanitary authority had power to pull down houses erected in a new street, on ground of non-compliance with bye-laws as to structure and deposit of plans.—*Baker v. Mayor of Portsmouth*, 25 W.R. 677.
- (xvi.) **Q. B. Div.**—*Street—Paving, &c.*—Where expenses of improvements of a street are charged on owners of premises fronting the street, notice of demand of payment must be served before taking summary proceedings to enforce payment, and the six months within which proceedings must be taken run from such demand.—*Grace v. Hunt*, L.R. 2 Q.B.D. 389; 46 L.J.M.C. 202; 36 L.T. 404; 25 W.R. 543.

Negligence:—

- (iii.) **C. A.**—*Building Works—Sub-contractor*.—Defendants having completed buildings in a street, removed the hoarding: a workman employed by S., a sub-contractor, who had undertaken the interior decoration of the buildings, let fall a tool from the window, whereby plaintiff was injured: *Held* that defendants were not liable.—*Pearson v. Coz*, 36 L.T. 495.

- (iv.) **Q. B. Div.—Furious Driving—Cab.**—Held upon the facts of the case, having regard to the arrangement between the proprietor and driver of a cab, that the relation of master and servant existed between them so as to render the proprietor liable for an accident caused by the furious driving of the driver.—*Venables v. Smith*, L.R. 2 Q.B.D. 279; 46 L.J. Q.B. 471; 36 L.J. 509; 25 W.R. 584.
- (v.) **Q. B. Div.—Furious Driving—Compensation.**—An award of compensation by magistrate, under 6 & 7 Vict., c. 86, s. 28, for damages caused by furious driving, is a bar to further proceedings against driver's employers by party injured.—*Wright v. London General Omnibus Co.*, L.R. 2 Q.B.D. 271; 46 L.J. Q.B. 429; 36 L.T. 590; 25 W.R. 647.
- (vi.) **C. P. Div.—Master and Servant—Carman.**—A carman employed by defendant to go round with defendant's cart and collect empty casks from customers, one day took out the cart for purposes of his own, without defendant's leave, and on his way back collected some casks, for which defendant afterwards paid him: whilst thus returning, he ran into and damaged plaintiff's cab: Held that defendant was not liable.—*Rayner v. Mitchell*, 25 W.R. 633.
- (vii.) **Q. B. Div.—Master and Servant—Coal-grate.**—A carman delivering coal removed iron plate on pavement communicating with a coal cellar: plaintiff, not being warned, fell into the opening and was injured: Held that the carman's employers were liable.—*Whiteley v. Pepper*, L.R. 2 Q.B.D. 276; 46 L.J. Q.B. 436; 36 L.T. 588; 25 W.R. 607.
- (viii.) **C. A.—Railway—Workman.**—A workman in employment of contractor while engaged on works in defendant's tunnel, was injured by a train: Held that defendants were not liable.—*Woodley v. Metropolitan Rail Co.*, 36 L.T. 419.

New South Wales, Law of:—

- (ii.) **P. C.—Bankruptcy—Proof—Partnership.**—Where two partners had joined with others not partners, as sureties for a person not a partner, in a bond rendering them jointly and severally liable: Held that on bankruptcy of the firm, the bond creditors were entitled to prove *pari passu* with the partnership creditors.—*Hoare v. Oriental Bank Corporation*, 25 W.R. 757.

Nuisance:—

- (ix.) **Q. B. Div.—Abatement—38 and 39 Vict..s. 94.**—An order was granted for abatement of a nuisance caused by flow of refuse from defendant's works on to premises of another person, and for execution by defendant of necessary works: Held that the order must be quashed.—*Regina v. Trimble*, 36 L.T. 568.

Partition:—

- (v.) **Ch. Div. M. R.—Sale—Fund in Court—Married Woman—Reconversion.**—In a partition suit, a married woman was declared entitled to share of real estate: she agreed, with her husband's consent, to sell the share to plaintiff: the purchase-money was ordered to be paid into Court: the woman died before the deed was executed: Held that the money belonged to her heir-at-law, not to her husband, as her administrator.—*Mildmay v. Quicke*, 26 W.R. 788.

Patent:—

- (xvi.) **Ch. Div. V. C. H.—Infringement—Injunction—Appeal.**—Defendants applied for suspension of an injunction granted to restrain infringement of plaintiff's patent for making ornamental tin plates on the ground that non-fulfilment of existing contracts would cause them irreparable damage: Held that this was no ground for suspension, as defendants could buy the plates and so fulfil their contracts.—*Flower v. Lloyd*, 36 L.T. 444.

- (xvii.) **Ch. Div. M. R.**—*Infringement—Validity*.—The rule that assignor of a patent is estopped from disputing its validity does not prevent his partner from separately raising that defence to an action for infringement.—*Heugh v. Chamberlain*, 25 W.R. 742.
- (xviii.) **Ch. Div. M. R.**—*Specification—Clerical Error—Jurisdiction*.—The Judicature Act, 1873, s. 17, reserves to M. R. his jurisdiction as keeper of the records to order amendment of a clerical error in a specification filed in the Patent Office.—*Re Johnson's patent*, L.R. 5 Ch. 503.
- (xix.) **H. L.**—*Specification—Combination*.—A patent for a combination in one thing of several integers will protect not only the whole thing but the separate integers and subordinate combinations thereof, provided such integers and combinations are so described in the specification as to make it clear that the patent is intended to apply to them as well as to the whole.—*Clark v. Adie*, L.R. 2 App. 315.
- (xx.) **Ch. Div. M. R.**—*Specification—Construction—Held* upon the construction of a specification of the patentee of a lamp burner, and having regard to drawings accompanying the specification, that the patent was bad for want of novelty.—*Hinks & Son v. Safety Lighting Co.*, 36 L.T. 392.

Poor Law:—

- (xiv.) **Q. B. Div.**—*Settlement—Removal Order*.—An order of removal, made in 1810, was produced at hearing of an appeal to prove pauper's last settlement: it was proved that the pauper had from the date of the order regularly received relief from, but not that he had actually been removed to, the parish: *Held* that there had been a sufficient execution of the order.—*Reg. v. Clifton Union*, 46 L.J. M.C. 209.
- (xv.) **Q. B. Div.**—*Settlement—Removal*.—*Held* that a person who resided in parish for three years, terminating before the passing of 39 and 40 Vict., c. 61, did not acquire a settlement under s. 34.—*Reg. v. Ipswich Union*, L.R. 2 Q.B.D. 269; 46 L.J. M.C. 207; 36 L.T. 317; 25 W.R. 511.
- (xvi.) **Q. B. Div.**—*Settlement—Removal—Break of Residence*.—A pauper had resided continuously for 15 years, and received relief for two years and a half in respondent's union: having received notice to quit his house, he removed to a house in a neighbouring union, and slept there one night: next morning he discovered his new residence was not in respondent's union, to which he accordingly returned: *Held* that there was sufficient break of residence to support order of removal to his last place of settlement.—*Newark Union v. Glanford Brigg Union*, 36 L.T. 793.

Practice:—

- (cxcix.) **C. A.**—*Appeal—Costs—Security—Delay*.—Where Court has ordered appellant to give security for costs without fixing time, appellant must comply within a reasonable time or the appeal will be dismissed.—*Vale v. Oppert*, 25 W.R. 610.
- (cc.) **C. A.**—*Appeal—Interpleader*.—An appeal lies to Court of Appeal from judgment on trial of an interpleader issue.—*Witt v. Parker*, 46 L.J. Q.B. 450; 36 L.T. 538; 25 W.R. 518.
- (cci.) **C. A.**—*Appeal—Re-hearing—Bill of Review—Ord. 58, r. 2*.—The Court has no power to re-hear appeals: in cases where discovery of facts after judgment would have entitled a party to file a bill of review, he must commence a new action to set aside the judgment.—*Flower v. Lloyd*, 25 W.R. 793.
- (ccii.) **C. A.**—*Appeal—Salvage—Costs*.—Where an appeal to increase the amount of salvage awarded is successful, appellant is entitled to his costs.—*The City of Berlin*, 25 W.R. 793.

- (cciii.) **C. A.**—*Appeal—Trustee Relief Act.—Costs.*—Trustees who have been ordered to pay costs personally under Trustee Relief Act cannot appeal from such order.—*Re Hoskin's Trusts*, 25 W.R. 779.
- (cciv.) **C. A.**—*Appeal in Criminal Matter.*—A judgment of App. Div. Ct. against conviction for keeping gaming house on case stated is a judgment of the High Court in a criminal matter from which there is no appeal.—*Blake v. Beech*, L.R. 2 Ex. D. 335; 36 L.T. 723.
- (ccv.) **Ch. Div. V. C. M.**—*Attachment.*—A sale by a promoter to a company was set aside, and he was ordered to repay the purchase-money: before repayment he filed liquidation petition: *Held* that he was not a trustee or person acting in fiduciary relation to the company within Debtors' Act, 1869, s. 4, and was protected from attachment by Bankruptcy Act, 1869, s. 12.—*Phosphates Sewage Co. v. Hartmont*, 25 W.R. 742.
- (ccvi.) **Ch. Div. V. C. H.**—*Attachment—Ord. 44, r. 2.*—Service of notice of motion to commit on a party or his solicitor is sufficient.—*Richards v. Kitchen*, 36 L.T. 730; 25 W.R. 602.
- (ccvii.) **C. A.**—*Attachment—Contempt—Ord. 42, r. 2.*—Orders were made in an action for inspection of documents at the office of C., defendant's solicitor, and also for stay of proceedings till security was given for costs: E., plaintiff's solicitor, attended accordingly, but C. refused to produce documents or to accept proposed security: E. left, but afterwards returned and asked for the draft bond: C. refused, and abused and forcibly ejected E.: *Held* that C. was not guilty of contempt of Court.—*Re Clements, Republic of Costa Rica v. Erlanger*, 46 L.J. Ch. 375; 36 L.T. 332.
- (ccviii.) **Q. B. Div.**—*Attachment—Examination—Conduct—Money—Ord. 45 r. 1.*—A party applying for attachment of judgment debtor for default in appearing for examination must show by affidavit offer of conduct-money and good reason for examination away from his place of residence.—*Protector Endowment Co. v. Whitham*, 36 L.T. 467.
- (ccix.) **Ch. Div. M. R.**—*Attachment—Refusal to Obey Order—Lease.*—Where a person has been directed to execute a lease, Court can only enforce the order by attachment, the Trustee Act, 1850, not having provided for such a case.—*Grace v. Baynton*, 25 W.R. 506.
- (ccx.) **Ch. Div. M. R.**—*Attachment—Service—Ord. 44, r. 2.*—Service of notice of motion for attachment on defendant's solicitor is sufficient.—*Browning v. Sabin*, L.R. 5 Ch. D. 511.
- (ccxi.) **Ch. Div. V. C. B.**—*Bill taken Pro Confesso.*—Where a bill was ordered to be taken *pro confesso*, and it turned out that defendant was dead at the date of such order, on application by plaintiff under 15 & 16 Vict., c. 86, s. 42, for appointment of a representative, a supplemental order was made to serve defendant's widow with notice that unless she appeared within six weeks from service of notice, Court would appoint a representative.—*Alforth v. Espinach*, 36 L.T. 367.
- (ccxii.) **Ch. Div. V. C. B.**—*Charging Order—1 & 2 Vict., c. 110, s. 11; Ord. 46, r. 1.*—Where judgment orders defendant to pay a sum certain on a future day plaintiff is entitled to charging order on defendant's property.—*Bagnall v. Carlton*, 36 L.T. 730.
- (ccxiii.) **Ch. Div. V. C. M.**—*Consolidation—Ord. 55, r. 4.*—Court can consolidate actions only at instance of defendants, not of different plaintiffs against the same defendant, but may, with a view to one being tried as a test action, enlarge time in the remaining actions.—*Amos v. Chadwick*, L.R. 4 Ch. D. 869.

- (ccxiv.) **C. A.**—*Costs—Ord. 55.*—Where a nonsuit had been set aside and new trial granted, which resulted in judgment for the plaintiff: *Held* that the costs of the first trial must "follow the event" of the second trial.—*Green v. Wright*, 46 L.J. C.P. 427; 36 L.T. 355; 25 W.R. 502.
- (ccxv.) **Q. B. Div.**—*Costs—Case Stated—Striking Out.*—A case having been stated by justices, but the appellant not having complied with requirements of the Act, an application to strike the case out of the paper was granted with costs against the appellants.—*Great Northern Committee v. Inett*, L.R. 2 Q.B.D. 284; 25 W.R. 584.
- (ccxvi.) **Ex. Div.**—*Costs—Collision.*—Where a defendant in an action for damages from collision of two ships succeeded only on ground of compulsory pilotage: *Held* that plaintiff was entitled to his costs.—*General Steam Navig. Co. v. London and Edinburgh Shipping Co.*, 36 L.T. 743; 25 W.R. 694.
- (ccxvii.) **Ch. Div. V. C. H.**—*Costs—Next Friend.*—Where costs are ordered to be paid by a next friend without reservation, the order is final against him personally, and cannot be re-opened on further consideration.—*Caley v. Caley*, 25 W.R. 528.
- (ccxviii.) **Q. B. Div.**—*Costs—Reference.*—Where order of reference under Common Law Procedure Act, 1854, was silent as to costs, Court refused application under Ord. 55 for costs on behalf of the party in whose favour the Master decided.—*Wimshurst v. Barrow Shipbuilding Co.*, L.R. 2 Q.B.D. 335; 46 L.J. Q.B. 477; 25 W.R. 557.
- (ccxix.) **C. A.**—*Costs—Priority—Citation to Prove Will—Administration.*—A company, creditors of testator, cited executrix to prove the will: subsequently E., also a creditor, obtained an order for administration of the estate: an order of the Prob. Div. having directed that the company's costs of the citation should be paid in priority to all other claims: *Held* that notwithstanding the order the costs of the administration must have priority.—*Re Mayhew*, 25 W.R. 521.
- (ccxx.) **P. D. A. Div.**—*Costs—Security—Foreign Defendants.*—Foreign defendants intervening in action of collision in rem by foreign plaintiffs, who have given security for costs, must, if they seek relief by counterclaim, give security for whole costs of action.—*The Julia Fisher*, 25 W.R. 756.
- (ccxxi.) **C. A.**—*Costs—Slander.*—In action for slander where only one farthing damages were awarded: *Held* that enactment in 21 Jas. 1, c. 16, was still in force, and that plaintiff was only entitled to one farthing costs.—*Garnett v. Bradley*, 36 L.T. 725; 25 W.R. 653.
- (ccxxii.) **C. A.**—*Costs—Slander—Ord. 55.*—Plaintiff, in action for slander recovered one farthing damages, no order was made as to costs: *Held* that plaintiff was entitled to one farthing costs only: decision of Q. B. Div. reported 36 L.T. 550 reversed.—*Bowey v. Bell*, 36 L.T. 640.
- (ccxxiii.) **C. P. Div.**—*Costs—Witness—Ord. 6, Sched. 2, 8.*—The Court allowed expenses of inspection of a building by surveyors, &c., to qualify them to give evidence at the trial.—*Mackley v. Chillingworth*, 46 L.J. C.P. 484; 36 L.T. 514; 25 W.R. 650.
- (ccxxiv.) **Ch. Div. V. C. H.**—*Default of Appearance—Ord. 13, r. 9.*—Where defendant makes default in appearance plaintiff must deliver statement of claim before setting down action on motion for judgment.—*Menton v. Metcalfs*, 36 L.T. 683.
- (ccxxv.) **Ch. Div. V. C. H.**—*Defence Struck out—Default of Pleading.*—In action for removal of a trustee defendant failed to file affidavit of documents: his defence was struck out, and order made against him on motion for judgment as in default of pleading.—*Fisher v. Hughes*, 25 W.R. 528.
- (ccxxvi.) **C. A.**—*Discovery.*—Defendant obtained an order for discovery of documents: liquidator filed affidavit setting forth certain documents, and

- stating he had no other in his possession: defendant applied for a further order on affidavit, stating his belief that the liquidator had further documents in his possession: *Held* that defendant was not entitled to further order.—*Welsh Steam Coal & Collieries v. Gaskell*, 36 L.T. 353.
- (ccxxvii.) **Ex. Div.**—*Discovery*—*Ord. 31, r. 12*.—Where Judge in Chambers refused to grant order for discovery without affidavit tracing some documents into defendant's hands, the Court refused to interfere.—*Johnson v. Smith*, 36 L.T. 741; 25 W.R. 539.
- (ccxxviii.) **C. P. Div.**—*Discovery*—*Interrogatories*—*Ord. 31, r. 1*.—Interrogatories will not be allowed after close of pleadings unless the delay is explained.—*Ellis v. Ambler*, 36 L.T. 410; 25 W.R. 557.
- (ccxxix.) **C. P. Div.**—*Discovery*—*Interrogatory*—*Objections to Answer*.—No appeal will be allowed from order of Judge at Chambers as to sufficiency of any answers to interrogatories which have not been specifically objected to.—*Church v. Perry*, 36 L.T. 513.
- (ccxxx.) **C. P. Div.**—*Discovery*—*Interrogatories*—*Objections*—*Ord. 31, r. 6*.—Plaintiff sued defendants as man and wife, and interrogated whether they were married, and also indirectly so as to elicit information on the point: the interrogatory as to the marriage was struck out: *Held* that defendants need not answer the other interrogatories on the point.—*Smith v. Berg*, 36 L.T. 471.
- (ccxxxi.) **Q. B. Div.**—*Discovery*—*Interrogatory*—*Tendency to Criminals*.—In action for libel defendant was interrogated if the words constituting the libel had not been written or circulated by him, or with his knowledge, authority, or consent: *Held* that the rule heretofore prevalent in equity must prevail, and the interrogatory be struck out.—*Atherley v. Harvey*, 36 L.T. 551; 25 W.R. 727.
- (ccxxxii.) **C. A.**—*Discovery*—*Privilege*—*Medical Report*.—Where plaintiff in an action for injuries sustained by defendants' negligence was examined under a Judge's order by medical men on behalf of defendants: inspection by plaintiff of their reports was refused.—*Friend v. London, Chatham, and Dover Rail. Co.*, 36 L.T. 729; 25 W.R. 735.
- (ccxxxiii.) **C. P. Div.**—*Discovery*—*Privilege*—*Surveyor's Report*—*Ord. 31, 211*.—*Held*, in an action for improper construction of steam tug, that reports of plaintiff's surveyors were liable to inspection.—*Martin v. Butchard*, 36 L.T. 732.
- (ccxxxiv.) **C. A.**—*Discovery*—*Prior Issue*—*Ord. 31, r. 19*.—In an administration action, a horse dealer claimed a sum as due on balance of account, in respect of sale and purchase of horses for testator: the executrix asked for discovery of names of purchasers and prices given by them for horses: *Held* that evidence was admissible of alleged custom of horse-dealers to act as principals not agents, and that executrix was not entitled to discovery till the question as to the existence of the custom was determined.—*Re Leigh, Sherard's Claim*, 25 W.R. 783.
- (ccxxxv.) **Ch. Div. V. C. H.**—*District Registry*—*Administration Action*.—Where in an administration action an order is made for taking accounts and inquiries in a district registry and for sale of real estate, the sale will take place in Chambers unless otherwise specially ordered.—*McDonald v. Foster*, 25 W.R. 602.
- (ccxxxvi.) **C. A.**—On appeal the Court treated the question as one of discretion of the Judge, and allowed his decision to stand.—*McDonald v. Foster*, 25 W.R. 687.
- (ccxxxvii.) **Ch. Div. V. C. H.**—*District Registry*.—Funds apportioned by district registrar can be paid into Court on an affidavit made subsequent to registrar's report verifying the amounts: costs will not generally be

- directed to be taxed by district registrar.—*Day v. Whittaker*, 36 L.T. 683; 25 W.R. 767.
- (ccxxxviii.) **Ch. Div. M. R.**—*Examiner*, 15 & 16 Vict., c. 86, s. 31.—An examiner's office is not a public court, and he has no discretion to allow any person to be present except the parties and their counsel, solicitors, or agents.—*Re Western of Canada Oil Lands and Works Co.*, 25 W.R. 787.
- (ccxxxix.) **C. A.**—*Exception to Record*.—The Judge directed the jury to find in favour of a will, and ordered an exception to his ruling to be annexed to the record, there being no record: *Held* that notice of appeal must be given.—*Cheese v. Lovejoy*, L.R. 2 P.D. 161.
- (ccxli.) **C. P. Div.**—*Interlocutory Order—Custody of Property*.—In action for return of goods left by plaintiff's agent to defendants who detained them against a debt of agent to them: Court made order, under Ord. 52, r. 3, for delivery of goods to officer of the Court to abide event of action.—*Velati v. Braham*, 46 L.J. C.P. 415.
- (ccxlii.) **Q. B. Div.**—*Interpleader—Claimant Barred—Action by Sheriff*.—A claimant, who has been barred, cannot set up the grounds of his claim in an action by the sheriff for recovery of price of goods on which sheriff had levied, and which he had sold.—*Williams v. Richardson*, 36 L.T. 505.
- (ccxliii.) **C. A.**—*Leave to Sign Judgment—Ord. 14, r. 1.*—A corporation suing on a specially endorsed writ, cannot obtain leave to sign judgment on affidavit by its secretary.—*Bank of Montreal v. Cameron*, 46 L.J. Ch. 425; 36 L.T. 415; 25 W.R. 593.
- (ccxliv.) **Ch. Div. V. C. M.**—*Motion for Judgment—Ord. 19, r. 6.*—Notice of motion for judgment need not be delivered between the parties where defendant has not appeared and the writ has been properly filed.—*Williams v. Cardwell*, 25 W.R. 646.
- (ccxlv.) **C. A.**—*Motion for Judgment—Ord. 40, r. 4.*—Notice must be given of motion to Court of Appeal to set aside judgment entered at trial before jury and to enter judgment.—*Jones v. Davis*, 36 L.T. 415.
- (ccxlv.) **C. A.**—*Motion for Judgment—Discretion—Ord. 40, r. 11.*—In action to enforce an equitable mortgage defendant admitted mortgage but alleged that it was part of agreement that there should be no legal mortgage nor payment of principal or interest for a year from the advance: V. C. H. refused motion of plaintiff for foreclosure order on admissions in defence: *Held* that C.A. would not interfere with his discretion.—*Mellor v. Sidebottom*, L.R. 5 Ch. 343.
- (ccxlii.) **Ex. Div.**—*New Trial—Fresh Evidence*.—New trial will not be granted on discovery of fresh evidence unless there is a reasonable probability that its production would have resulted in a different verdict.—*Anderson v. Titmas*, 36 L.T. 711.
- (ccxlvii.) **Ex. Div.**—*New Trial—Time—Ord. 39, r. 6.*—Time for application for new trial on ground of misdirection runs from discharge of jury.—*Shaw v. Hope*, 25 W.R. 729.
- (ccxlviii.) **C. A.**—*Parties—Joinder—Ord. 16, r. 3; Ord. 17, r. 1.*—Statement of claim alleged that defendants had trespassed on land let to plaintiff by W.: defence set up grant of right of way prior to plaintiff's lease: *Held* that plaintiff was entitled to amend by joining W. as defendant and claiming alternative relief against him for breach of covenant for quiet enjoyment.—*Child v. Stenning*, 36 L.T. 426; 25 W.R. 519.
- (ccxlix.) **C. A.**—*Parties—Joinder—Ord. 16, r. 7.*—"Question" means not merely issue but subject-matter of the action: Defendant cannot obtain *ex parte* order to add third person as defendant.—*Horwell v. London General Omnibus Co.*, 36 L.T. 637; 25 W.R. 512, 610.

- (col.) **C. P. Div.**—*Parties—Joinder—Ord. 16, rr. 17, 18.*—A person added as defendant is not entitled to join as co-defendant a person against whom he has himself a claim.—*Walker v. Balfour*, 25 W.R. 511.
- (coli.) **Ch. Div. V. C. M.**—*Petition—Service—Official—Solicitor.*—Service on official solicitor in cases within Chancery Pay Office list and regulations of 1st February, 1877, may be dispensed with when petitioner's title is clear.—*Re Stanhope*, 25 W.R. 601.
- (colii.) **Ch. Div. F. J.**—*Pleading—Amendment—Ord. 19, r. 22.*—Statement of defence contained general denial of fact consistent with several issues and an allegation raising specifically one issue: *Held* that such issue was alone open to defendant at trial and leave to amend refused.—*Byrd v. Nunn*, 25 W.R. 749.
- (coliii.) **Q. B. Div.**—*Pleading—Counter-claim.*—When defendant makes a counter-claim and joins a third party as defendant thereto, the third party cannot make a counter-claim against defendant so joining him.—*Street v. Gover*, 36 L.T. 766; 25 W.R. 750.
- (coliv.) **Ch. Div. F. J.**—*Pleading—Counter-claim—Ord. 19, rr. 3, 10.*—In a pleading containing defence and counter-claim the facts relied on as supporting the counter-claim must be clearly distinguished and specifically stated to be relied on.—*Crowe v. Barnicott*, 25 W.R. 789.
- (colv.) **P. D. A. Div.**—*Preliminary Acts—Collision—Ord. 19, r. 30.*—In action for damage by collision by owners of cargo against owners of ship in which cargo was carried: *Held* that preliminary acts need not be delivered.—*The John Boyne*, 25 W.R. 756.
- (colvi.) **Ch. Div. M. R.**—*Reference—Inquiry as to Damages.*—In action for specific performance, inquiry as to damages, necessitating examination of witnesses, was referred to official referee.—*Stafford v. Coxon*, 25 W.R. 788.
- (colvii.) **C. P. Div.**—*Service of Writ—Jurisdiction.*—The Court has no jurisdiction over acts done by foreigners on high seas below low water mark and cannot order service on foreigner residing abroad of writ in respect of cause of action arising at sea though within the three-mile limit.—*Harris v. Owners of Franconia*, L.R. 2 C.P.D. 173; 46 L.J. C.P. 363.
- (colviii.) **Ch. Div. V. C. H.**—*Service out of Jurisdiction—Company.*—Court has jurisdiction to order service of summons under Companies' Act, 1862, ss. 100, 165, upon respondents out of the jurisdiction.—*Re British Imperial Corporation*, 25 W.R. 583.
- (colix.) **C. A.**—*Transfer of Action—Ord. 51, r. 2.*—W. gave notice to G. to rescind contract for purchase of land on ground of G.'s delay: G. delivered counter-claim for specific performance: *Held* that there was a question of equity to be tried, that Chan. Div. alone had machinery for giving relief to G., if successful, and that the action must be transferred to Chan. Div.—*Ho'loway v. York*, L.R. 2 Ex. D. 333; 25 W.R. 627.
- (colx.) **Ch. Div.**—*Trial by Jury—Ord. 36, rr. 3, 26.*—In an action for a mandatory injunction for removal of an alleged obstruction of plaintiff's lights: *Held* that defendant was entitled to have issues of fact tried by a jury.—*Bordier v. Russell*, L.R. 5 Ch. Div. 512; 25 W.R. 801.
- (colxi.) **Ch. Div. V. C. B.**—*Writ—Indorsement.*—In creditor's action for administration of intestate's real and personal estate the writ must be endorsed with claim by plaintiff "on behalf of himself and all the other creditors."—*Fryer v. Royle*, L.R. 5 Ch. D. 540; 36 L.T. 441; 25 W.R. 528.
- (colxii.) **C. P. Div.**—*Writ—Interpleader.*—Pending hearing of interpleader summons in chambers, plaintiff issued writ of summons and defendant undertook to appear: *Held* that writ was properly issued.—*Hooks v. Ind*, 36 L.T. 467.

Principal and Agent:—

- (xii.) **Q. B. Div.**—*Auctioneer—Liability—Conditions of Sale.*—A purchaser at a sale by auction delayed in clearing his goods beyond the time prescribed, and the goods having been misdelivered sued the auctioneers: *Held* that on the face of the catalogue and conditions the defendants had personally contracted with plaintiff to deliver the goods, and that the condition as to clearing the lot within three days was not a condition precedent.—*Woolfe v. Horne*, L.R. 2 Q.B.D. 355; 36 L.T. 705; 25 W.R. 728.
- (xiii.) **C. A.**—*Broker—Marine Insurance—Sub-agent—Lien.*—An insurance broker employed as sub-agent by another broker to effect marine policies has the same rights of lien as if directly employed by principal.—*Fisher v. Smith*, 25 W.R. 719.
- (xiv.) **C. P. Div.**—*Commission.*—A. employed B. to sell a ship on commission to be paid on sale to any person "led to make such offer in consequence" of B.'s publication; on sale to purchaser who did not see, but merely heard of B.'s publication: *Held* that B. was entitled to commission.—*Bayley v. Chadwick*, 36 L.T. 740.
- (xv.) **C. A.**—*Foreign Government—Bonds—Jurisdiction.*—Plaintiff was holder of Peruvian Government bonds, pledging specially the proceeds of sale of guano: defendants as agents of the Government received part of the guano: *Held* that the bonds were not legally enforceable by an English court and that defendants as agents of a foreign Government, could not be sued.—*Twycross v. Dreyfus*, 36 L.T. 752.

Probate:—

- (xx.) **P. D. A. Div.**—*Foreigner—Lex Loci.*—A Frenchman naturalized in England executed a will and codicils disposing of his property in England, and also a holograph will disposing of his property in France and referring to his English will, and died at Paris: it being shown that by French law the will of a British subject made in English form is valid, the Court granted probate of the English will and codicils.—*In the goods of Lacroix*, L.R. 2 P.D. 97.

Public Health:—

- (ix.) **C. A.**—*Drainage Board—Committee.*—Decision of C.P. Div., Public Health (v.), p. 106, affirmed.—*Cook v. Ward*, 25 W.R. 593.
- (x.) **C. P. Div.**—*Exposure of Infected Person.*—A surgeon sent a fever patient to the hospital with a certificate, telling him to walk in the middle of the road and speak to no one: owing to informality of certificate patient returned to surgeon, who next day accompanied him to chairman of local board for order of admission, and thence to the hospital: *Held* that magistrates rightly refused to convict surgeon of wilfully exposing an infected person in a public street.—*Tunbridge Local Board v. Bishopp*, L.R. 2 C.P.D. 187.

Railway:—

- (xxvii.) **C. P. Div.**—*Carrier—Loss of Goods—Liability.*—Plaintiffs consigned goods by defendants' line to one Farmer: they were addressed in error to the order of Jeeves, who refused to accept them: one Jarvis then claimed them, and they were delivered to him by the station master without further enquiry: the consignment note relieved defendants from liability except for "wilful misconduct": *Held* that plaintiff was entitled to recover damages from defendants for misdelivery of the goods.—*Hoare v. Gt. West. Rail. Co.*, 25 W.R. 681.
- (xxviii.) **C. A.**—*Carriers—Passengers' Luggage—Cloak Room—Conditions on Ticket.*—Decision of C.P. Div., Railway (vi.), p. 31, reversed, and new trial granted.—*Parker v. S. E. Rail. Co.*, 36 L.T. 540; 25 W.R. 564.

- (xxix.) **C. A.**—*Negligence—Overcrowding Full Compartment.*—A passenger endeavouring to prevent persons from getting into an already full compartment was injured by the porter slamming the door: *Held* that there was sufficient evidence of negligence for jury to entitle passenger to recover damages.—*Jackson v. Metropolitan Rail. Co.*, L.R. 2 C.P.D. 125; 46 L.J. C.P. 376; 36 L.T. 485; 25 W.R. 661.
- (xxx.) **Q. B. Div.**—*Negligence—Train Overlapping Platform.*—Where a passenger was injured by getting out of a carriage at a station of which the platform was too short for the train: *Held* upon the facts of the case that there was not sufficient evidence of negligence for the jury.—*Owen v. G. W. Rail. Co.*, 46 L.J. Q.B. 486.
- (xxxi.) **Q. B. Div.**—*Passenger—Bye-law.*—A bye-law imposed on passenger not producing his ticket the liability to pay the fare from place whence the train originally started: *Held* that there must be a demand of the specific amount of the fare to entitle the company to recover.—*Brown v. Gt. Eastern Rail. Co.*, L.R. 2 Q.B.D. 406; 36 L.T. 767; 25 W.R. 792.
- (xxxii.) **Ex. Div.**—*Undue Preference*—17 & 18 Vict., c. 31.—Plaintiff's manufactory was situate 12 miles from a seaport S. on the defendants' line from S. to L.: in order to compete with sea carriers defendants charged other manufacturers living within six miles of S. at a less rate per ton for carriage of goods than they charged plaintiff: *Held* that this was undue preference.—*Budd v. London and North-Western Rail. Co.*, 36 L.T. 802; 25 W.R. 752.

River:—

- (i.) **Ch. Div. M. R.**—*Navigation—Obstruction.*—Plaintiff owned a wharf adjoining defendant's wharf, and also a collier, the length of which was greater than the frontage of his wharf: defendant moved a raft in front of his wharf so as to prevent the collier from coming alongside plaintiff's wharf: *Held* that the raft was an illegal obstruction to the navigation of the river.—*Original Hartlepool Collieries Co. v. Gibb*, 36 L.T. 433.

Revenue:—

- (ix.) **Q. B. Div.**—*Land Tax.*—Where an established usage was proved whereby a property was assessed as part of a particular parish: *Held* that such assessment must be maintained on a new assessment affirmed by the Commissioners at variance with the usage must be set aside.—*Regina v. Land Tax Commissioners*, 36 L.T. 874.
- (x.) **C. A.**—*Land Tax—Hospital*—38 Geo. 3, c. 5.—Decision of Q. B. Div., Revenue (vii.), p. 107, reversed.—*Rabbits v. Cox*, 36 L.T. 453; 25 W.R. 594.
- (xi.) **Ex. Div.**—*Stamp Duty—Medicine*—52 Geo. 3, c. 150—3 & 4 Wm. 4, c. 97.—Defendant sold powders composed of carbonate of soda, carbonic acid, gas, and chlorate of potash which he advertised as beneficial for disorders: *Held* that they were liable to duty.—*Atty.-Gen. v. Lamplough*, 25 W.R. 753.

School Board:—

- (ii.) **Q. B. Div.**—*Neglect to Send Child to School—Form of Summons.*—A summons for habitual neglect of parent to send child to school must be taken out under Elementary Education Act, 1876, s. 11, and cannot be granted under the bye-laws of the School Board.—*Re Murphy*, L.R. 2 Q.B.D. 397; 46 L.J.M.C. 193; 36 L.T. 698; 36 L.T. 468; 25 W.R. 536

Scotland, Law of:—

- (vii.) **H. L.**—*Bankruptcy—Set-off.*—Indorser of a bill of exchange on bankrupcy of acceptor may set-off amount paid by him in respect of the bill against a debt to acceptor's estate without reference to prior indorser.—*McKinnon v. Armstrong*, 36 L.T. 482.

- (viii.) **H. L.**—*Nuisance*.—*Held* that in a case of nuisance several sufferers may combine to bring a joint action for declarator and interdict, but in such a case there must be contingentia.—*Cowan v. Duke of Buccleugh*, L.R. 2 App. 344.

Sea Wall :—

- (i.) **C. A.**—*Liability to Repair*.—*Held*, affirming decision of Q. B. Div., that there is no common law liability on frontager to repair sea walls, and that in this case there was no obligation by prescription.—*Hudson v. Tabor*, L.R. 2 Q.B.D. 290; 46 L.J. Q.B. 463; 36 L.T. 492; 25 W.R. 740.

Settlement :—

- (xvii.) **Ch. Div. M. R.**—*After Acquired Property*.—The rule that covenant to settle after acquired property applies only during coverture, applies to cases where settlement contains assignment of after acquired property.—*Holloway v. Holloway*, 25 W.R. 575.
- (xxviii.) **Ch. Div. V. C. B.**—*Covenant—Will—Election*.—A, on his daughter's marriage, covenanted with trustees of her settlement that on his death a share of his property should be settled for benefit of her and her issue: by his will he directed payments of his debts, and gave certain bequests to the issue of the daughter: *Held* that the covenant was not satisfied by the direction to pay debts, and that the daughter's issue were put to election.—*Bennet v. Houldsworth*, 36 L.T. 648.
- (xxix.) **Ch. Div. V. C. H.**—*Felon—Revocation—Charge*.—A felon before conviction conveyed realty to trustees reserving power of revocation, while still undischarged, he borrowed money on memorandum of agreement to charge his settled estate: *Held* that the memorandum was a valid exercise of the power in favour of the mortgagee.—*Mainprice v. Pearson*, 25 W.R. 768.
- (xxx.) **Ch. Div. M. R.**—*Postnuptial Settlement—Mortgage*.—Postnuptial settlement of wife's real estate upheld against subsequent mortgagee without notice.—*Re Foster & Lister*, 46 L.J. 490; 36 L.T. 582; 25 W.R. 553.
- (xxxi.) **C. A.**—*Postnuptial Settlement—Consideration—Purchase for Value without Notice*.—Decision of V. C. B., Settlement (xvii.), p. 73, affirmed.—*Teesdale v. Braithwaite*, 36 L.T. 601; 25 W.R. 546.
- (xxxii.) **Ch. Div. V. C. M.**—*Rectification*.—When intended husband acting as intended wife's agent to prepare settlement of her property gave himself the first life interest: *Held* that the settlement must be rectified by giving the first life interest to the wife.—*Clark v. Girdwood*, 25 W.R. 575.
- (xxxiii.) **Ch. Div. F. J.**—*Voluntary Settlement—Children of Former Marriage*.—A widow on her second marriage covenanted to surrender copyhold property for benefit of herself for life with remainder to her children by former marriage: *Held* that such children could enforce the covenant.—*Gale v. Gale*, 36 L.T. 690; 25 W.R. 772.

Ships :—

- (lxviii.) **C. A.**—*Carrier—Delay—Loss of Market*.—Decision of P.D.A. Div., Ship (v.), p. 35, reversed.—*The Parana*, L.R. 2 P.D. 118; 36 L.T. 388; 25 W.R. 596.
- (lix.) **C. P. Div.**—*Charter-party—Construction*.—In an action by charterers of a ship for loss of cargo through negligence of master and crew: *Held*, on the construction of the charter-party, that the master and crew were servants of the owner, and that he was liable for their negligence.—*Omoa and Cleland Coal and Iron Co. v. Huntley*, 25 W.R. 675.
- (lxx.) **C. A.**—*Charter-party—Freight pro rata—Voyage not completed*.—Decision

- of Q.B. Div., Ship (ix.), p. 36, affirmed.—*Metcalfe v. Britannia Ironworks Co.*, L.R. 2 Q.B.D. 423; 46 L.J. Q.B. 443; 36 L.T. 451; 25 W.R. 720.
- (lxxi.) **H. L.**—*Collision—Compulsory Pilotage*.—If a collision is proved to have occurred through fault of a pilot compulsorily employed, the burden of proving contributory negligence of defendants lies on plaintiff.—*Clyde Navigation Co. v. Barclay*, 36 L.T. 379.
- (lxxii.) **C. A.**—*Collision—Jurisdiction*.—Held that the Court has jurisdiction to entertain action in rem against a foreign vessel by representatives of person on board a British ship killed by collision on high seas, caused by negligence of those on board the foreign vessel: decision of Adm. Div. (reported 36 L.T. 445; 25 W.R. 699) affirmed.—*The Franconia*, 36 L.T. 640; 25 W.R. 796.
- (lxxiii.) **C. A.**—*Damage to Pier Abroad—Lex Loci*.—The liability of a shipowner for damage to a pier affixed to soil of a foreign country is governed by the *lex loci*.—*The M. Moxham*, L.R. 1 P.D. 107; 46 L.J. P.D.A. 17; 34 L.T. 559; 24 W.R. 650.
- (lxxiv.) **P. D. A. Div.**—*Equipment—Lien*.—A material-man having no lien for equipment supplied to British ship, cannot enforce claim against ship in hands of subsequent purchaser with notice of unpaid claim.—*The Aneroid*, 36 L.T. 448.
- (lxxv.) **P. D. A. Div.**—*Salvage—Jurisdiction*.—In action for life salvage, defendant alleged that ship was not at time of such salvage stranded, or otherwise in distress, on the shore of any sea or tidal river within the limits of the United Kingdom, and submitted that Court had no jurisdiction: Held that services were in part rendered in British waters, and demurrer allowed.—*The Deutschland*, 25 W.R. 765.
- (lxxvi.) **C. A.**—*Salvage—Liability of Cargo*.—Decision of P.D.A. Div., Ship (xxiii.), p. 37, affirmed.—*Cargo ex Schiller*, L.R. 2 P.D. 145; 36 L.T. 714.
- (lxxvii.) **P. D. A. Div.**—*Shares in Ship—Fraudulent Registration—Bona fide Purchaser*.—Fraudulent registration of shares in a ship by intermediate transferee is no defence to action for possession by bona fide purchaser for value without notice of the fraud.—*The Horlock*, 36 L.T. 622.
- (lxxviii.) **C. A.**—*Wreck—Obstruction—Liability*—10 & 11 Vict., c. 27, s. 56.—Where a wreck on which underwriters had paid as for total loss caused obstruction to harbour: Held that the shipowner, not the underwriters, were liable to the harbour-master for expenses of removing the wreck.—*Eglinton v. Norman*, 25 W.R. 656.

Solicitor:—

- (xi.) **Ch. Div. M. R.**—*Articled Clerk—Service*.—A clerk was articled to his father: during one year of the service business was practically suspended owing to the father's ill-health: Held that on the expiration of the five years he might undergo his final examination, but must enter into fresh articles for a year before being admitted.—*Ex parte Feraday*, 46 L.J. Ch. 64.
- (xii.) **Ch. Div. V. C. H.**—*Duty to Client—Information Acquired Professionally*.—Held that a solicitor who had acted in formation of a company and been discharged was competent to act for a petitioner to wind-up the company.—*Re Holmes*, 25 W.R. 608.
- (xiii.) **Ch. Div. V. C. B.**—*Gift by Client—Confirmation*.—Held that a gift to a solicitor from his client was absolutely void even though confirmed by a subsequent deed prepared by an independent solicitor.—*Morgan v. Minett*, 25 W.R. 744.
- (xiv.) **Ch. Div. M. R.**—*Lien—Bill of Costs*.—A solicitor delivered bill of costs in pending suits in which he subsequently, with client's knowledge,

incurred further costs: client having obtained order for taxation and delivery of papers, solicitor delivered bill for the further costs: *Held* that the order should be amended by inserting both bills.—*Ex parte Jarman*, L.R. 4 Ch. D. 835; 46 L.J. Ch. 485.

- (xv.) **C. A.**—*Retainer—Journey—Costs—Ratification.*—Decision of M. R., Solicitor (viii.), p. 76, reversed.—*Re Snell*, 36 L.T. 534; 25 W.R. 736.

Tramway:—

- (iii.) **Ch. Div. M. R.**—*Deposit.*—Where a company is abortive and ordered to be wound-up, the Court cannot order the deposit to be applied for the benefit directly or indirectly of the shareholders or promoters.—*Re Lowestoft Tram. Co.*, 46 L.J. Ch. 393; 36 L.T. 578; 25 W.R. 525.

Trustee:—

- (ix.) **Ch. Div. F. J.**—*Breach of Trust—Liability.*—Two trustees advanced money to a builder on mortgage of land which he had purchased from defendant, one of the trustees: part of the money was applied by builder in payment of purchase-money of the land: *Held* that the other trustee was not entitled to a decree, that the mortgage securities should be realised, and the deficiency, if any, should be made good by defendant.—*Butler v. Butler*, L.R. 5 Ch. D. 554.
- (x.) **Ch. Div. F. J.**—*Misapplication of Funds—Liability.*—A trustee who allows the trust funds to be under the sole control of a co-trustee is liable to make good to the estate any money misapplied.—*Rodbard v. Cooke*, 36 L.T. 604; 25 W.R. 555.

University:—

Q. B. Div.—*Religious Tests—Fellowship.*—The Universities Tests Act, 1871, applies to fellowships of a college, since substituted for a hall, subsisting at passing of the Act, though the fellowships have been founded subsequently to the substitution: when the governing body of such college refused to examine a nonconformist for a fellowship: *Held* that mandamus would issue.—*Reg. v. Hertford College, Oxford*, 36 L.T. 769.

Vendor and Purchaser:—

- (xiii.) **C. A.**—*Evidence of Title*—37 & 38 Vict., c. 78.—Under Vendor and Purchasers Act, 1874, s. 9, the Court can receive the same evidence as to title as would have been receivable on a reference to Chambers in an action for specific performance.—*Re Burroughs and Lynns Contract*, 36 L.T. 778; 24 W.R. 520.
- (xiv.) **Ch. Div. M. R.**—*Specific Performance—Auctioneer—Conveyance in Parcels.*—In an action for specific performance: *Held* that when the deposit was of any large amount the auctioneer was rightly made a party, that a purchaser was entitled a tender of purchase-money and costs, to require separate conveyances of land in parcels, that a vendor was justified, and in absence of indemnity from purchaser bound to relet farms where delay in completion of the purchase was in prospect.—*Earl of Egmont v. Smith*, 46 L.J. Ch. 356.
- (xv.) **P. C.**—*Specific Performance—Coal Mine—Wrongful Working.*—Defendant in suit for specific performance for sale of a coal mine had wrongfully worked the mine for his own benefit: *Held* that plaintiff was entitled to compensation estimated on value of coal at place where it was sold less cost of severance and carriage.—*Brown v. Dibbs*, 25 W.R. 776.
- (xvi.) **C. A.**—*Specific Performance—Conditions of Sale.*—Decision of V. C. B., Vendor and Purchaser (vi.), p. 77, affirmed.—*Gale v. Squier*, 36 L.T. 632.
- (xvii.) **C. A.**—*Statute of Frauds—Description of Vendor.*—*Held* that a description of vendor not named as a "trustee selling under trust for sale" was sufficient to satisfy the Statute of Frauds.—*Catling v. King*, 46 L.J. Ch. 384; 36 L.T. 526; 25 W.R. 550.

- (xviii.) **C. A.**—*Use and Occupation—Rent.*—Decision of Q. B. Div., Vendor and Purchaser (xii.), p. 111, affirmed.—*Metropolitan Railway Co. v. Defries*, L.R. 2 Q.B.D. 387; 36 L.T. 494.

Victoria, Law of:—

- (iii.) **P. C.**—*Rateability—Racecourse.*—The Victoria Local Government Act, 1874, exempts from payment of rates land, the property of Her Majesty, used for public purposes: *Held* that this exemption did not extend to a land used as a racecourse and demised by the Crown to trustees of a club which had a pecuniary interest in the profits of the land, and the members of which had privileges beyond the public with regard to use of the land.—*Mayor of Essendon v. Blackwood*, 36 L.T. 625.

Voluntary Gift:—

- (iv.) **Ch. Div. V. C. M.**—*Donatio Mortis Causa—Cheque.*—A., during his last illness in Italy, gave to his wife a cheque which was discounted by her but not presented in London till after A.'s death: *Held* that she was entitled to the amount of the cheque out of A.'s estate.—*Rolls v. Pearce*, 36 L.T. 438.

Warranty:—

- (ii.) **Q. B. D.**—*Animals—Sale in Market—Disease.*—Sale in market of animals intended for food implies representation that they are not suffering from disease, and a condition of sale that they are to be taken "with all faults" will not affect such representation.—*Ward v. Hobbs*, L.R. 2 Q.B.D. 331; 46 L.J. Q.B. 473; 36 L.T. 511; 25 W.R. 585.

Water:—

- (vi.) **C. A.**—*Breach of Statutory Duty*—10 Vict., c. 17, s. 42.—Where plaintiff's premises were burnt down owing to insufficient pressure in defendants' pipes: *Held* that only remedy was the penalty imposed by Statute, and that no action would lie.—*Atkinson v. Newcastle and Gateshead Waterworks Co.*, 36 L.T. 761; 25 W.R. 794.

Will:—

- (xc.) **Ch. Div. V. C. M.**—*Bequest of Fund to Pay Debts—Retainer.*—Testatrix created a fund for payment of testamentary expenses and debts, and bequeathed the surplus to W. No administration action seemed probable: *Held* that the trustees should retain the surplus for a year from death of testatrix and then pay it over to W.—*Re Cope's Trusts*, 36 L.T. 437.
- (xci.) **Ch. Div. V. C. H.**—*Charity—Mortmain Act.*—*Held* that the operation of the Mortmain Act is retrospective so as to abrogate the power of a corporation under a previous Special Act from receiving gifts of real estate.—*Luckraft v. Pridham*, 36 L.T. 501; 25 W.R. 747.
- (xcii.) **Ch. Div. V. C. M.**—*Charity—Premium for Lease.*—An unpaid premium for a lease is not pure personalty capable of being bequeathed to charity: a bequest of all personal estate which can by law be bequeathed to charity is specific.—*Shepherd v. Beetham*, 25 W.R. 764.
- (xciii.) **Ch. Div. V. C. M.**—*Construction—Death without Issue.*—Devise of real estate to A. for life, remainder to A.'s husband for life, remainder to A.'s children living at death of testatrix, provided that shares of A.'s children dying without issue should go over to survivors leaving issue: *Held* that dying without issue meant so dying in lifetime of tenants for life.—*Besant v. Cox*, 25 W.R. 789.
- (xci.) **Ch. Div. F. J.**—*Construction—Direction to Pay Debts.*—Testator directed payment of his debts, "including a debt of £300" owing to his daughter: only £150 was owing: *Held* that the daughter was only

entitled to payment of what was actually due.—*Wilson v. Morley*, 36 L.T. 731; 25 W.R. 690.

- (xcv.) **Ch. Div. M. R.**—*Construction—Election*.—S. having appointed certain property by deeds not containing powers of revocation, by her will purported to revoke the appointments and dispose of the property: *Held*, on the construction of the will, that certain persons claiming under the will were put to election: the doctrines of election and compensation fully explained.—*Pickersgill v. Rodger*, L.R. 5 Ch. D. 163.
- (xcvi.) **Ch. Div. V. C. M.**—*Construction—Equitable Estate*.—Testator, who died in 1828, gave real estate to trustees in fee upon trust for the sole benefit of his two daughters, with direction that if either should die and leave no child, part of the estate should be sold and proceeds divided as mentioned; but that if either should have children, her share should go to such children after her death: neither of the daughters had children: *Held* that they took as joint tenants in fee.—*Yarrow v. Knightley*, 25 W.R. 687.
- (xcvii.) **H. L.**—*Construction—Express Trust—Statute of Limitations*.—*Held*, on the construction of an informally worded will made in 1807, that an express trust for a legacy was thereby created so as to exclude the Statute of Limitations, but that no proceedings to enforce payment of the legacy having been taken till 1872, the plaintiffs ought not to receive more than six years' interest on the legacy from the filing of the bill.—*Thompson v. Eastwood*, L.R. 2 App. 215.
- (xcviii.) **Ch. Div. V. C. B.**—*Construction—"Heirs"*.—Bequest of personalty to wife for life, and, after her decease, "to be divided amongst my heirs": *Held* that "heirs" meant next-of-kin exclusive of wife, and that the class was to be ascertained at testator's death.—*Re Peppitt's Estate*, *Chester v. Phillips*, 36 L.T. 500.
- (xcix.) **Ch. Div. V. C. H.**—*Construction—Implication*.—*Held*, on the construction of a will, that "descendants" meant "children," and that testator's wife did not take by implication a life interested in his residuary estate.—*Ralph v. Carrick*, 25 W.R. 530.
- (c.) **Ch. Div. V. C. H.**—*Construction—Implication*.—Gift of residue in trust for A. till 21 or marriage *held* not to imply gift of capital on attaining 21 or marriage.—*Re Hedley's Trusts*, 25 W.R. 529.
- (ci.) **Ch. Div. V. C. B.**—*Construction—Implication*.—Testator gave to his trustees and executors power to manage and sell his real estate, and directed them, under his wife's management, to carry on his farm for the maintenance of his family, and declared that, subject to these provisions, his real and personal estate should be held in trust for his children equally: *Held* that the legal estate in the realty passed to the trustees who on wife's death could sell and convey.—*Cooke v. Simpson*, 46 L.J. Ch. 463.
- (cii.) **C. A.**—*Construction—Inconsistency*.—Gift of personal estate to wife absolutely, subsequent gift in same will of residue of personalty in trust for children: *Held* that wife took life interest.—*Re Bagshaw's Trusts*, 36 L.T. 747; 25 W.R. 659.
- (ciii.) **H. L.**—*Construction—Maintenance—Discretion of Trustees*.—A lunatic was absolutely entitled to certain funds which had been comprised in her marriage settlement: her husband by his will gave another fund to trustees upon trust "in their discretion and of their uncontrollable authority" to apply the income for her maintenance, and subject to such application the fund and income thereof were to fall into the residue: *Held* that the discretion of the trustees under the will was absolute.—*Gisborne v. Gisborne*, L.R. 2 App. 300; 36 L.T. 564; 25 W.R. 516.
- (civ.) **Ch. Div. V. C. M.**—*Construction—Next of Kin*.—Testator bequeathed

- fund to his daughter for life, with remainder to her next of kin according to statute, but in exclusion of any husband: he also bequeathed a fund to his son for life, with remainder to his next of kin according to statute: *Held* that on death of the son his widow was entitled to share with his next of kin.—*Re Collins' Trusts*, 36 L.T. 437.
- (cv.) **Ch. Div. V. C. B.**—*Constitution*.—*Next of Kin*.—*Period of Distribution*.—Gift of fund equally among testators four daughters and then to their issue, and after death of last surviving daughter, if without issue, then to next of kin under Statute of Distribution: *Held* that on construction of the will, the next of kin were a class to be ascertained at the death of the surviving daughter, not of the testator.—*Mortimore v. Slater*, 25 W.R. 646.
- (cvi.) **C. A.**—*Construction*.—*Power*.—Decision of M.R., Will (lxiv.), p. 80, affirmed.—*Re Veales' Trusts*, 36 L.P. 364.
- (cvii.) **Ch. Div. V. C. H.**—*Construction*.—*Precatory Trust*.—Bequest to testator's wife "for her to do justice to her husband's relations," but under no restriction to any stated property, but to be at liberty to give what and to whom she pleased: *Held* not to create a trust.—*Cole v. Hawes*, 46 L.J. Ch. 488.
- (cviii.) **Ch. Div. M. R.**—*Construction*.—*Precatory Trust*.—Bequest of residue in trust for such of nieces A. and B. as should "be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes": *Held* that A. and B. took beneficially.—*Stead v. Mellor*, L.R. 5 Ch. D. 225; 36 L.T. 498; 25 W.R. 508.
- (cix.) **C. A.**—*Construction*.—*Residuary Bequest*.—*Ejusdem Generis*.—Decision of V. C. M., Will (lxxxii.), p. 113, affirmed.—*King v. George*, 36 L.T. 759; 25 W.R. 638.
- (cx.) **C. A.**—*Construction*.—*Residuary Legatee*.—*Realty*.—Where testator commenced his will "As to my estate," and after specific devises and bequests appointed A. and B. his "residuary legatees:" *Held* that realty not specifically disposed of passed to A. & B. by the will.—*Hughes v. Pritchard*, 25 W.R. 761.
- (cxii.) **Ch. Div. F. J.**—*Construction*.—*Specific Legacy*.—*Ademption*.—Subsequently to date of a will containing a specific legacy, testator invested part of the money comprised in the legacy in the purchase of stock of the B. and E. Railway, he died possessed thereof and of other similar stock: *Held* on the construction of the will that the stock so purchased as aforesaid passed by the bequest.—*Morgan v. Thomas*, 36 L.T. 689; 25 W.R. 750.
- (cxiii.) **Ch. Div. M. R.**—*Construction*.—*Substitution*.—Devise to A. for life, remainder on trust for sale and to hold proceeds for "children of F., or their issue, in equal shares *per capita*": there were six children of F.; four died during life of testator, two survived A.: *Held* that issue of the deceased children of F. alive at testator's death took by substitution the shares of their deceased ancestors in equal shares as between themselves.—*Re Sibley's trusts*, L.R. 5 Ch. D. 495; 46 L.J. 387.
- (cxiiii.) **Ch. Div. M. R.**—*Construction*.—*Technical Words*.—"Seised."—Gift of real estate, "of which I may die seised:" testatrix, at her death, was entitled as heiress-at-law of K. to certain freeholds, of which his widow had taken and retained wrongful possession: *Held* that the freeholds did not pass by the will.—*Leach v. Jay*, 46 L.J. Ch. 499; 25 W.R. 574.
- (cxv.) **Ch. Div. V. C. H.**—*Conversion*.—Gift of residue in trust for wife for life and subject thereto to five persons equally: there was a clause authorising trustees to allow monies to remain in present state of investment: *Held* that the widow was not entitled to enjoyment in specie of long annuities.—*Porter v. Baddeley*, L.R. 5 Ch. D. 542.

- (cxv.) **Ch. Div. V. C. H.**—*Conversion*.—Testatrix devised her residuary real estate subject to a term for raising money upon certain trusts: these trusts having failed, *Held* that the residuary devisee took the fund as personalty.—*Re Newbery's Trusts*, 25 W.R. 747.
- (cxvi.) **Ch. Div. V. C. M.**—*Election*.—Testator devised realty on trust for sale and gave proceeds on his widow's death as to one moiety to his son absolutely, and as to other moiety to him absolutely if he should not have become bankrupt: the realty was not sold: son died in the widow's lifetime, having by his will elected to take the realty unconverted: *Held* that he was capable of so electing.—*Meek v. Devenish*, 25 W.R. 688.
- (cxvii.) **Ch. Div. M. R.**—*Executor, Gift to*.—*Held* that presumption that legacy to P. named executor, who disclaimed, was given to him as executor was rebutted by its being payable after death of tenant for life.—*Re Reeve's Trusts*, L.R. 4 Ch. D. 841; 46 L.J. Ch. 412; 25 W.R. 628.
- (cxviii.) **Ch. Div. V. C. M.**—*Express Trust—Tenant in Tail—Recovery*.—Devise to A. in tail, upon "special trust and confidence" that A., if he should have no issue, would do nothing to defeat subsequent limitations, with remainder over: *Held* that right to suffer recovery was incident to estate tail and not destroyed by the trust.—*Dawkins v. Lord Penrhyn*, 36 L.T. 680.
- (cxix.) **Ch. Div. M. R.**—*Maintenance*.—Testator bequeathed a fund to his infant grandson when he should attain 25 years, and provided that a sum not exceeding £200 a year might be applied for his maintenance: *Held* that the presumption that the infant was entitled to the interest was rebutted by the sum fixed for maintenance, and that the Court could not increase the amount to be allowed.—*May v. Potter*, 25 W.R. 507.
- (cxx.) **C. A.**—*Misdescription*.—Devise of six named meadows, to testator's son for life, remainder as he should appoint: the son by his will appointed "all that part and parts of the property comprised in and devised by the here-inbefore-recited will of my late father as is and are therein described as," &c.: the description omitted two of the meadows: *Held* that the omitted meadows passed.—*Travers v. Blundell*, 36 L.T. 341.
- (cxxi.) **Ch. Div. V. C. H.**—*Misdescription*.—Devise of freeholds at M.: testator had no freeholds at M., but had freeholds at R. which M. adjoined, and in which parish M. was situate: *Held* that the property at R. descended to the heir-at-law.—*Barber v. Wood*, L.R. 4 Ch. D. 885; 36 L.T. 373.
- (cxxii.) **C. A.**—*Release of Debt*.—Bequest to member of firm of debts due from him does not release debts of firm.—*Ex parte Kirk, Re Bennet & Glave*, 36 L.T. 431; 25 W.R. 598.
- (cxxiii.) **Ch. Div. V. C. M.**—*Release of Debts*.—Bequest of debts "now owing" does not release from debts incurred subsequently to date of the will.—*Everett v. Everett*, 25 W.R. 765.
- (cxxiv.) **P. D. A. Div.**—*Revocation*.—Deceased executed a will in 1858, disposing of all her property. In 1860 she made another will, beginning, "This is the last will," etc., varying and repeating certain bequests given in first will, but containing no residuary or revocatory clauses: *Held* that the first will was revoked.—*Dempsey v. Lawson*, L.R. 2 P.D. 98; 46 L.J. P.D.A. 23; 36 L.T. 515; 25 W.R. 629.
- (cxxv.) **Ch. Div. V. C. M.**—*Void Trust*.—Testator gave a sum to trustees on trust to keep in repair tombstones, and to apply the residue as directed by his will: *Held* that the trust being void the whole amount must be applied as directed as to the residue.—*Re Williams*, 25 W.R. 689.

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Er. J. M.

